

No. 13245

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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WESTERN AIR LINES, INC.,

*Petitioner,*

*vs.*

CIVIL AERONAUTICS BOARD,

*Respondent.*

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BRIEF OF WESTERN AIR LINES, INC.

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GUTHRIE, DARLING & SHATTUCK,

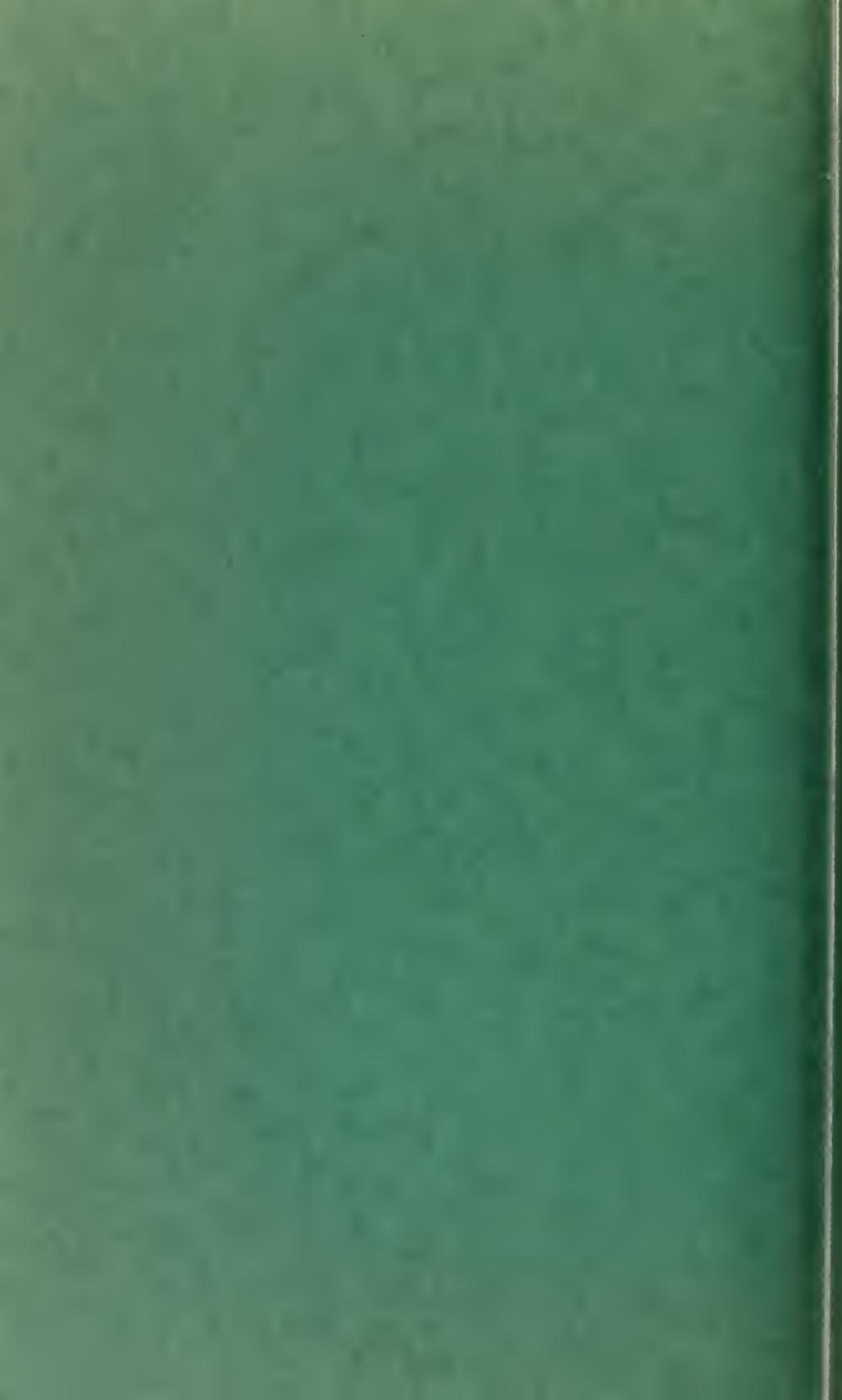
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**FILED**

MAR 10 1952



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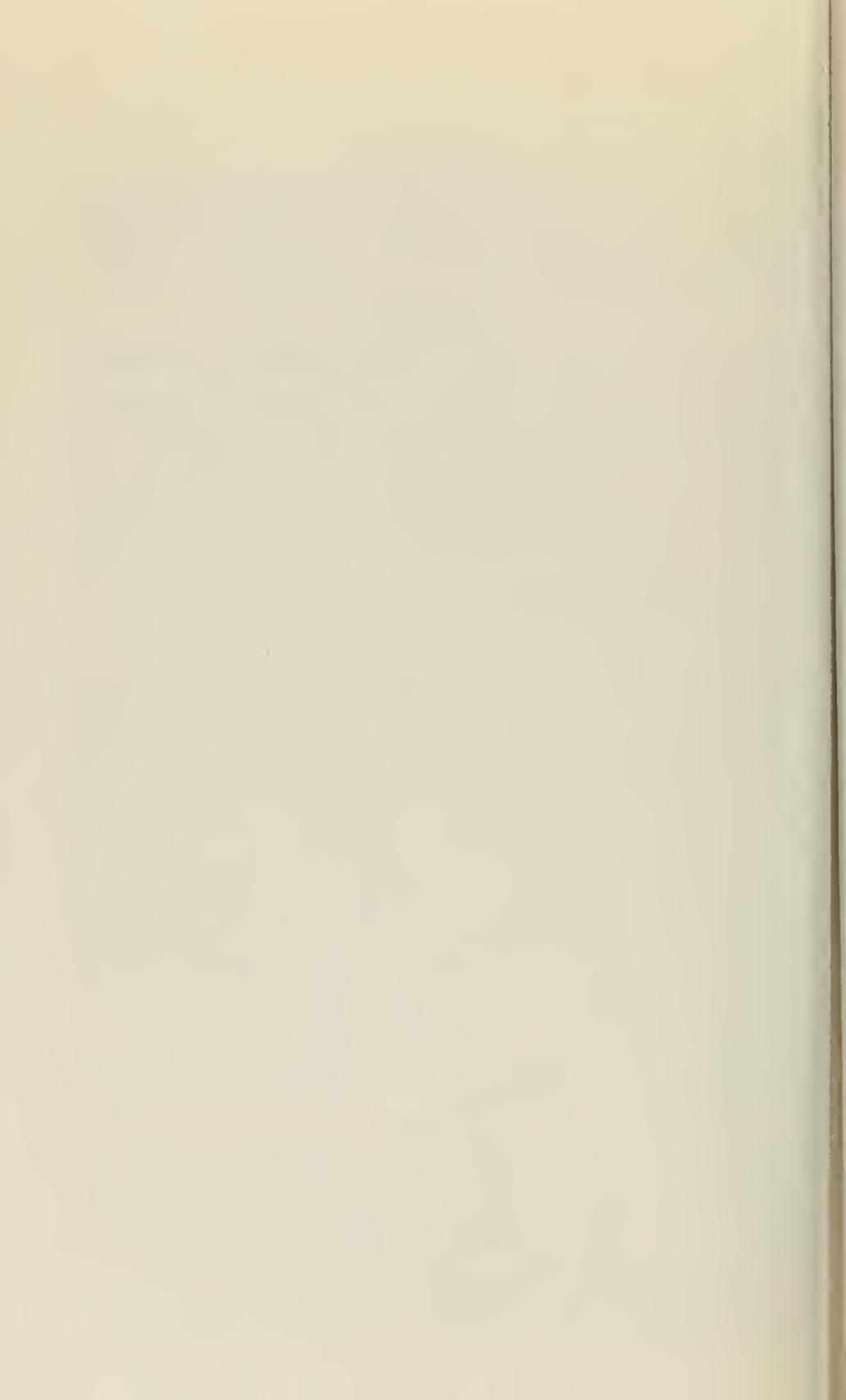
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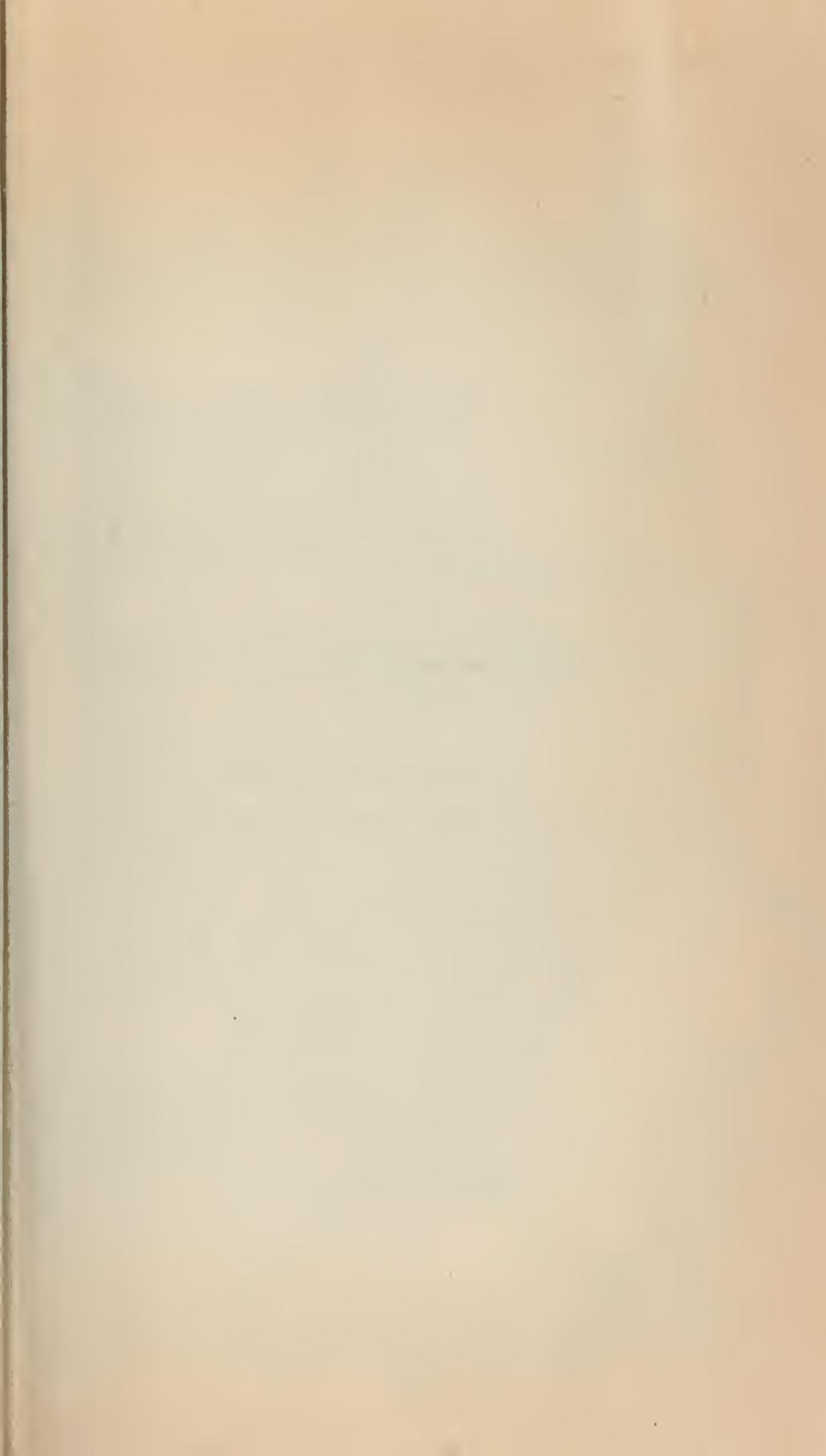
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## Statement of the Case.<sup>2</sup>

### 1. Order Under Review.

In the Order challenged the Board purportedly suspended, but in fact revoked, Western's permanently certificated right to serve El Centro, California, and Yuma, Arizona, with air transportation of persons, property and mail in order that air transportation to those communities might be provided by Bonanza Air Lines, Inc. under a new certificate extending that feeder carrier's service from Phoenix, Arizona, to Los Angeles, California, by way of Ajo and Yuma, Arizona, Blythe, El Centro, San Diego, Oceanside, Laguna-Santa Ana and Long Beach, California. A copy of the Order appears as Appendix A to this brief.

In its Order and during the argument before this Court on Western's application for a Stay Order the Board conceded that the ejection of Western from El Centro and Yuma was a necessary prerequisite to the admission of Bonanza to the new route from Phoenix to Los Angeles.

The primary issue on this review concerns the right of the Board to eliminate a route segment of a permanently certificated carrier for the benefit of a new carrier under a purportedly temporary certificate. In order

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<sup>2</sup>On February 18, 1952, as a condition to the issuance of a Stay Order, Petitioner's brief was required to be filed within twenty days, Respondent's brief within twenty days thereafter, with ten days for a reply brief. This time limitation does not permit the printing of the portion of the record designated by the parties as material to a consideration of the review as required by Rule 19. Accordingly, citations to the record cannot be made and some liberties will have to be taken in referring to facts. Should reference be made to a fact which proves not to be in the record, upon the request of the Court or any party a supporting affidavit will be supplied.

that the fundamentals of the primary issue may be placed in sharper focus, a brief sketch of the origin and development of the trunk airlines and of the feeder airlines will be presented, with an outline of the origin and development of Western's service to the Imperial Valley.

## 2. History of Domestic Trunklines.

Privately operated commercial air transportation first drew breath twenty-six years ago as the direct consequence of the Air Mail Act of 1925, passed ". . . to encourage commercial aviation and to authorize the Postmaster General to contract for Air Mail Service." In the fall of 1925 the first air mail routes were awarded, with bids going to six private contractors, and scheduled commercial air transportation became fact the following spring. Of these pioneer carriers only Western, which inaugurated service between Los Angeles and Salt Lake City on April 17, 1926 with open-cockpit Douglas bi-planes, remains today flying under its own banner. The others have passed into obscurity or formed the nuclei of such present-day systems as American Airlines and United Air Lines.

Some 5,782 passengers were carried by scheduled airlines in 1926, a trifling figure which increased to a little better than 8,500 in 1927. Only a million and a half pounds of mail were transported by air in 1927, with 128 small single-engine aircraft in service.

This infant industry expanded slowly at first, but steadily. In the initial years of operation, air carriers were concerned almost wholly with mail service. It was the design, in part, of the Watres Act of 1930 to encour-

age passenger service. The decline of the securities market and business depression in the early 30's weeded out many carriers—some suspended services, others merged with larger companies. However, general progress and expansion continued until the Air Mail Act of 1934.

Under that act all air mail contracts were cancelled, and a system of competitive bidding for mail contracts was installed. Regulatory authority over airlines was vested in three governmental agencies, the Post Office Department in the awarding of mail contracts, the Bureau of Air Commerce in the prescribing of operational and safety standards, and the Interstate Commerce Commission in the regulating of rates to be paid for the carriage of mail. It was possible then for anyone to engage in air transportation and to compete for the carriage of passengers. The internecine competition and the unstable economic conditions which ensued within the industry are common knowledge.

In 1938, after extended hearings and debate, Congress remedied the situation with the enactment of the Civil Aeronautics Act, the basic charter of federal regulation in the field of aviation. That Act served to coordinate all functions involving air transportation under one independent governmental agency and to insure economic security and stability of operation with certificates of public convenience and necessity.

Since 1938 the dramatic advance of the air transportation industry in this country, during peace and in war, has exceeded all reasonable expectations. Few chapters in the annals of transportation can match the

progress which has been experienced by the domestic air trunklines, as revealed by this statistical tabulation:

	<u>1938</u>	<u>1951</u>
Domestic Air Trunklines	16	16
Route Miles in Operation	38,757	128,653 <sup>3</sup>
Two-Engine Aircraft	229	422
Four-Engine Aircraft	0	405
Operating Property and Equipment	\$22,919,000	\$272,376,000 <sup>4</sup>
Passengers Carried	1,365,706	19,734,000 <sup>5</sup>
Revenue Passenger Miles Flown	51,619,000	9,680,057,000 <sup>5</sup>
Mail Ton Miles Flown	7,500,000	57,818,000 <sup>5</sup>
Total Operating Revenues	\$27,047,000	\$632,183,000 <sup>5</sup>
Mail Pay	\$15,800,000	\$40,085,000 <sup>5</sup>
Average Mail Pay per Mail Ton Mile	\$2.12	\$0.69 <sup>5</sup>
Personnel	9,008	66,473

The operating results of the domestic trunkline system from 1938 to 1951, in terms of cost to the government, are significant. Revenue from air mail stamps totalled \$641,027,503. Payments to the carriers amounted to \$412,080,219, and the Post Office Department expended \$277,865,011 in allocated internal costs. Thus, for the 13-year period a net cost to the Government of \$48,917,727 was experienced or less than \$3,800,000 per year, a small price to pay for the development of the finest air transportation system in the world, including the carriage of air mail.

<sup>3</sup>Certificated route miles.

<sup>4</sup>As of September 30, 1951.

<sup>5</sup>Year ended September 30, 1951.

### 3. History of Feeder Airlines.

The year 1943 found the Civil Aeronautics Board deluged with some 233 applications for new air service to 3,097 communities of the nation, in comparison to the 288 cities then receiving certificated service, involving an increase in domestic route miles of 688%. This presented a unique problem to the Board, in that service to the communities involved, on the whole, did not appear warranted under normal economic considerations and existing standards of operation. Lacking information with which to meet and answer the claims put forth with great enthusiasm by the proponents of the feeder service, the Board instituted an investigation to determine the feasibility and need for a general expansion of domestic air services.<sup>6</sup>

Given the green light by the Board, the feeder experiment began to unfold. "Area" proceedings were instituted and beginning in 1946 with the award of two feeder routes in the *Rocky Mountain States Area Service* case, 6 C. A. B. 695, decisions were issued in rapid-fire order.<sup>7</sup> By 1948 sixteen new feeder carriers had been certificated to operate 21,000 new route miles, totals which by 1949 had increased to twenty new feeder carriers and 26,000 new route miles. Thus, "experimental" feeder operations were extended to substantially every part of the United States.

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<sup>6</sup>*Local, Feeder and Pick-Up Air Services*, 6 C. A. B. 1 (1944).

<sup>7</sup>*Florida Case*, 6 C. A. B. 765 (1946); *West Coast Case*, 6 C. A. B. 961 (1946); *New England Case*, 7 C. A. B. 27 (1947); *Texas-Oklahoma Case*, 7 C. A. B. 481 (1947); *North Central Case*, 7 C. A. B. 639 (1947); *Southeastern States Case*, 7 C. A. B. 863 (1947); *Great Lakes Area Case*, 8 C. A. B. 360 (1947); *Mississippi Valley Case*, 8 C. A. B. 726 (1947); *Arizona-New Mexico Case*, 9 C. A. B. 85 (1948); *Middle Atlantic Area Case*, 9 C. A. B. 131 (1948).

The year 1949 was the first year in which the earliest feeder certificates were scheduled to expire, and accordingly, in that year the Board entered upon the review phase of its program. It now had the facts and figures which were lacking in 1944. In the ensuing years, the operating rights of a substantial number of feeders were renewed, some for an additional period of five years. In only one instance has the Board refused to renew a feeder certificate.<sup>8</sup>

Mergers of feeders have been approved, verifying that the experimental period is past.<sup>9</sup> Among others, the merger of two feeders operating in Washington, Oregon and Idaho is now before the Board for approval<sup>10</sup> and concurrently with its Order in this case the Board, on its own motion, instituted an investigation as to whether the public convenience and necessity would be served by the merger of Southwest Airways and Bonanza Air Lines.<sup>11</sup>

In retrospect, the Board's feederline program as it is being administered today bears little resemblance to the experiment launched in 1944. Feeders are not performing services which differ significantly from the services provided by trunklines. No new type aircraft peculiarly adapted to short haul transportation has been developed. Local ownership and local areas of coverage, once believed essential to the success of the venture, are no longer of interest to the Board. The ingenuity

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<sup>8</sup>*Florida Airways Certificate Extension*, 10 C. A. B. 93 (1949).

<sup>9</sup>*Monarch-Challenger Merger*, 11 C. A. B. 33 (1949) *Arizona-Monarch Merger*, 11 C. A. B. 246 (1949).

<sup>10</sup>*West Coast-Empire Merger*, Docket No. 5220.

<sup>11</sup>Order Serial No. E-6041, January 17, 1952.

and rigid economy, which in practice would enable the new feeder carriers to offset the competition with highly developed rail and highway transportation, have run their course.

The so-called experiment quickly passed reasonable bounds, metamorphosing completely into the planned development of a permanent secondary route system. In the language of Donald W. Nyrop, Chairman of the Civil Aeronautics Board:<sup>12</sup>

“. . . the commercial air route pattern of the United States has evolved naturally into a two-level structure; that is, the structure on the one hand of the major trunkline air operation and on the other hand of the local air service serving small cities and towns on comparatively short-haul operations. As we progress further into the future with air travel becoming more and more necessary and usable, I believe that the judgment of the Civil Aeronautics Board in laying the foundation for this secondary short-haul air transportation will be more than justified. *The local schedule air carrier operation has come to stay.*”<sup>13</sup>

Not since 1949 in the single case of *Florida Airways, Certificate Extension*, 10 C. A. B. 93, has the Board shied against continued “experimentation” with public funds where the standards originally set down in 1944 and 1946 have not been met, and then only in a situation where the carrier was, as a practical matter, bankrupt. With

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<sup>12</sup>Address before Local Service Airline Seminar, Purdue University, June 20, 1951.

<sup>13</sup>Emphasis in quoted material added throughout unless otherwise noted.

the renewal of five feeder certificates,<sup>14</sup> and renewal of most of the remainder in process, it has now become obvious that any feeder which comes through the initial period of certification unscathed by bankruptcy can anticipate enduring existence, although on paper its authority may be limited to a period of years. Accordingly, after six years of operation, it is apparent that feeder airlines are a permanent fixture of our transportation system.

Today seventeen feederlines are in the field, with one trunkline, Mid-Continent Airline, operating a feeder route under a feeder-type certificate. Additionally, two carriers operate feeder service routes with rotary wing aircraft. The feedline industry employs 4,645 individuals and operates 31,939 certificated feeder route miles, with 26 single-engine and 134 twin-engine aircraft, at an original property and equipment cost of \$7,913,000. For the year ended September 30, 1951 they carried a total of 1,371,000 passengers, flew 269,380,000 revenue-passenger miles and 818,000 mail-ton miles and realized aggregate operating revenues of \$33,956,000, of which \$18,636,000 or 54.88% were received from the United States Government in the form of mail pay at the average rate of \$22.78 per mail-ton mile (compared to an average rate of 69c per mail-ton mile for the trunklines) or \$1.22 for every dollar received from the commercial sale of transportation.

Still the line of demarcation between a feeder and a trunkline has not been drawn. Western, as its route structure shows, engages in feeder type service on several segments of its system. Indeed, every trunkline, the transcontinentals included, conducts some feeder type service.

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<sup>14</sup>Trans-Texas to March 31, 1954; Pioneer to September 30, 1954; Southwest to September 30, 1954; Frontier to March 31, 1955; Wisconsin Central to September 30, 1955.

#### 4. History of Western's Service in the Imperial Valley.

Effective August 22, 1938, Western was certificated, under the "grandfather clause" of the Civil Aeronautics Act, Section 401(e)(1), to engage in the transportation by air of persons, property and mail over a route, among others, to be known as Route 13, extending from San Diego, California, to Salt Lake City, Utah, via the intermediate points, Long Beach and Los Angeles, California, and Las Vegas, Nevada.<sup>15</sup>

Western's pioneering efforts in the Imperial Valley and its attempts to link that area with Phoenix, Arizona, as well as with the coastal areas of Southern California, began on April 22, 1940, when Western filed an application with the Board for authority to operate a new air route between San Diego and Phoenix via El Centro, California, and Yuma, Arizona. After consolidation for hearing with one case and subsequent severance and consolidation with a companion case, that application was heard and Western's certificate for Route 13 was amended to include El Centro, among other points.<sup>16</sup>

In 1944, Western again petitioned the Board for authority to operate east of El Centro to Yuma and Phoenix, among other stations, with the result that Yuma was added as a certificated point on Route 13.<sup>17</sup> In succeeding years, Western continued to press for a route pattern embracing Phoenix, the Imperial Valley and Los Angeles-San Diego. A 1946 application for extension from Yuma

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<sup>15</sup>*Western Air Express Corporation—Certificates of Public Convenience and Necessity*, 1 C. A. A. 39 (1939).

<sup>16</sup>*Transcontinental & W. A., et al., North-South California*, 4 C. A. B. 254, 274 (1943); *American Air, et al., East-West California*, 4 C. A. B. 297, 321 (1943).

<sup>17</sup>*Rocky Mountain States Air Service*, 6 C. A. B. 695, 741 (1946).

to Phoenix was denied.<sup>18</sup> In the case here under consideration Western once again requested the same authority it had applied for a decade back.

Air service to the Imperial Valley was inaugurated by Western in January, 1946, after notification from the Board<sup>19</sup> that the national defense no longer required a delay in the implementation of the amendment granted in 1943.

The evolution of the type of service pattern flown today by Western in the Imperial Valley was marked by a period of experimentation. Inaugural service consisted of a turn-around flight between Los Angeles and San Diego via Palm Springs and El Centro. After several months, that type of schedule proved to be unsatisfactory, and the flight plan was altered after due notice to the Board to provide for a morning turn-around schedule between Los Angeles and El Centro via Palm Springs and an afternoon turn-around schedule between Los Angeles and El Centro via San Diego. With the discontinuance a few months later of service over the segment between Palm Springs and El Centro, the pattern of Western's operation in the Imperial Valley took the shape which, after inauguration of service to Yuma following certification of that point in 1946, has been maintained consistently to this date. Thus, for all intents and purposes, Yuma became the southern-most terminal for Route 13, as if that route had been extended beyond San Diego to El Centro and Yuma the same as Western's original Route 63 between Los Angeles and San Francisco was extended beyond San Francisco to Portland and Seattle.

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<sup>18</sup>*Arizona-New Mexico Case*, 9 C. A. B. 85, 102 (1948).

<sup>19</sup>Order, Serial No. 4027, September 13, 1945.

Financially Western has experienced some lean years in serving the Imperial Valley. The serious retrogression in the air transportation industry after World War II impelled much curtailment of service and reorganization, the effects of which only now are being completely removed. Western weathered the turbulence, which at times threatened to engulf it, and today is proud of its record of having reached within the span of a few years a self-sufficient status without need for subsidy mail pay.

It is understandable, therefore, that in the years immediately following World War II Western did some experimenting with its operations in the Imperial Valley, even to the extent of at one time conditionally contracting for the transfer of the San Diego-Yuma segment of Route 13 to Arizona Airways, which had been certificated to fly between Yuma and Phoenix.

Western's investment of time, money and effort in providing service to El Centro and Yuma on the Imperial Valley segment of its permanent certificate for Route 13 has borne fruit in the past year and a half. Both El Centro and Yuma are profitable stations on Western's system, as indicated by reports filed by Western with the Board and part of the stipulated record in this case. Those cities are important economically to Western's total operation.

## QUESTIONS INVOLVED.

1. Does the order of the Board, in so far as it eliminates Western from El Centro and Yuma, amount to a revocation in part of Western's certificate in violation of Section 401(h) of the Act which permits revocation, in whole or in part, only if the holder be in default and fail to comply within a reasonable time with an order commanding obedience?

2. Assuming the elimination of Western from El Centro and Yuma to be a temporary suspension only, does the Board have the legal power under Section 401(h) of the Act to suspend a permanent certificate, in whole or in part, in order to make room for a new carrier?

3. Does the elimination of a permanently certificated carrier from a route segment or from intermediate points, whether by temporary suspension or by permanent revocation, without just compensation violate the Fifth Amendment of the United States Constitution?

## SPECIFICATION OF ERRORS.

The errors which Western relies upon and urges in support of its position on this review are:

1. The Board erred in eliminating Western from El Centro and Yuma under circumstances and in a manner which amount to a revocation in part of Western's permanent certificates for Route No. 13 without complying with the revocation provisions of Section 401(h) of the Act.

2. The Board erred in eliminating Western from El Centro and Yuma, though the elimination be only a tem-

porary suspension in part of Western's permanent certificate for Route 13, because Section 401(h) of the Act does not permit the suspension in whole or in part of a permanent certificate in order to make room for a new carrier.

3. The Board erred in depriving Western of property rights without just compensation contrary to the provisions of the Fifth Amendment of the United States Constitution.

### SUMMARY OF ARGUMENT.

1. **The Order of the Board Amounts to a Revocation in Part of Western's Certificate Contrary to the Provisions of Section 401(h) of the Act.**

The circumstances and the proclamations of the Board make it manifest that the Board's Order eliminating Western from El Centro and Yuma amounts to a revocation in part of its permanent certificate for Route 13. Absent a default by Western, which did not exist here, and a failure to comply within a reasonable time with an order of compliance, the Board lacked the legal power to revoke the certificate, either in whole or in part.

To assume that the elimination of Western from El Centro and Yuma will continue only until December 31, 1952, the theoretical termination date of Bonanza's certificate, would be to ignore realities and attribute to the Board an act which would be unwise, profligate and contrary to the spirit and the objectives of the Act.

The Board has stated that Bonanza could not operate successfully between Phoenix and Los Angeles via the

designated intermediate points unless Western be eliminated from El Centro and Yuma. It would not be sensible to argue that the Board intended to allow Bonanza to incur the cost which would be required to start and maintain an operation between Phoenix and Los Angeles, only to order that operation discontinued on December 31, 1952, and Western's operations at El Centro and Yuma resumed. Thus, the elimination of Western from these points is tantamount to a revocation in part of its certificate. The revocation was not accomplished in compliance with Section 401(h) of the Act.

**2. The Suspension Provisions of Section 401(h) of the Act Do Not Permit the Elimination of a Permanently Certificated Air Carrier to Make Room for a New Air Carrier.**

The purpose of the Civil Aeronautics Act was and is to develop and lend stability to the air transportation industry. To say that Section 401(h) of the Act permits the Board to remodel the national air route structure by eliminating a permanently certificated carrier from points or segments of its system for the benefit of a new or another carrier would be to say that impermanence and instability are congenial to the spirit of the Act.

It is not fitting that an air carrier, which has provided adequate service, should have its permanent rights suspended solely to enable another carrier or a new carrier to perform the same service at a point or in an area where the traffic is insufficient to support two carriers on an economical basis.

3. **Elimination of Western From El Centro and Yuma, Either by Suspension or Revocation, Without Just Compensation for Its Lost Property Rights Is in Violation of the Fifth Amendment of the Constitution.**

The fact that Western's certificate for Route 13 does not "confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing area or air navigation facility,"<sup>20</sup> does not mean that the elimination of Western from El Centro and Yuma is exempt from the provisions of the Fifth Amendment of the Constitution.

The loss that Western will suffer in anticipated profits, in the cost of shutting down the operation, in abandoning, moving or selling ground facilities at El Centro and Yuma involves property rights. Without just compensation, and none is provided for in the Order, the elimination of Western from El Centro and Yuma constitutes a violation of the Fifth Amendment.

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<sup>20</sup>Section 401(j) of the Act.

## ARGUMENT.

1. The Order of the Board Amounts to a Revocation in Part of Western's Certificate Contrary to the Provisions of Section 401(h) of the Act.

### (a) Statute Involved.

The power of the Board to eliminate Western from the Imperial Valley segment of its Route 13, if it had the power, must come from Section 401(h) of the Act, which reads in full:

“The Authority [Board], upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, or modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, *or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Authority, with an order of the Authority commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Authority to have been violated. Any interested person may file with the Authority a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.*”

The Board contends that its act was only suspension, not revocation. Hence, the Board does not suggest that the procedure required to be followed under 401(h) before

a certificate can be revoked in whole or in part was, in fact, followed in this case.

If it can be shown that the act of the Board in ordering Western out of El Centro and Yuma under the prevailing circumstances amounts to revocation, the Board's Order must be reversed on that point alone.

**(b) The Factual Background Discloses That the Order of the Board Can Be Construed Only as a Revocation in Part if Meaning Is to Be Assigned to the Second Part of 401(h).**

In its Order the Board chose with the utmost care words that would seem to stamp the elimination of Western from El Centro and Yuma as a temporary suspension only:

“We have decided that the suspension of Western's authority to serve El Centro and Yuma should terminate with the expiration of the local service segment awarded herein to Bonanza, *i. e.*, on December 31, 1952, when Bonanza's certificate formally expires.” (Appendix A, p. 19.)

But these words are hollow in the face of related facts and other acts of the Board and in the face of less guarded words used by the Board elsewhere in the Order.

As for the less guarded words, the Board said this in the Order:

“Based on the foregoing considerations and all the facts of record, we find that the public convenience and necessity require the provision of a local air service between the co-terminal points, Los Angeles and Long Beach, California, and the terminal point, Phoenix, Arizona. . . .” (Appendix A, p. 9.)

\* \* \* \* \*

“Thus, after full consideration of the record in this proceeding in the light of the well-established Board policies with respect to the selection of carriers to operate local air service routes, and with relation to the Board’s responsibilities for the encouragement and development of a self-sufficient and adequate air transportation system, we have selected Bonanza as the carrier to be authorized to provide the required local air service.” (Appendix A, p. 16.)

\* \* \* \* \*

“These are factors which support our conclusion that the transportation needs of El Centro and Yuma will, *in the long run*, be better served by a local service carrier than by a trunk.” (Appendix A, p. 17.)

These words do not support the bald declaration that the elimination of Western is temporary. To the contrary, they connote clearly and precisely that the “suspension” is permanent. A permanent suspension is a revocation, no matter how it may be seasoned or colored.

The acts of the Board unmasking the suspension are many. Perhaps the act which reveals with the most telling conviction that the elimination of Western’s Imperial Valley segment is permanent and not temporary is the order of the Board instituting an investigation concerning the integration of the routes of Southwest Airways Company and Bonanza. This order, which was issued on January 17, 1952, the same day that the Order here challenged was issued, and bears Serial Number E-6041, the next succeeding number, reads in full:

“Orders

Serial Number E-6041

UNITED STATES OF AMERICA  
CIVIL AERONAUTICS BOARD  
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board  
at its office in Washington, D. C.  
on the 17th day of January, 1952.

In the matter of the integration of the routes of:

SOUTHWEST AIRWAYS COMPANY

and

BONANZA AIR LINES, INC.

Docket No. 5254

ORDER INSTITUTING INVESTIGATION.

It appears to the Board on the basis of preliminary study that an investigation should be instituted to determine if a combination of Southwest Airways Company (Southwest) and Bonanza Air Lines, Inc. (Bonanza) by means of merger, consolidation, acquisition of control, or route transfer, or in any other lawful manner, would be in the public interest and in accordance with the public convenience and necessity.

The Board, acting pursuant to the Civil Aeronautics Act of 1938, as amended, and particularly Sections 205(a), 415, and 1002(b) thereof, and finding that its action herein will assist it in performing its duties and exercising its powers under the Act;

IT IS ORDERED:

(1) That investigation be and it hereby is instituted to determine whether the integration of the routes of Southwest and Bonanza into a single *unified*

system by means of merger, consolidation, acquisition of control, route transfer or in any other lawful manner would be in the public interest and in accordance with the public convenience and necessity as defined in Section 2 of said Civil Aeronautics Act.”

As pictured by the map forming the frontispiece of this brief, Bonanza's Route No. 105 runs from Reno, Nevada, to Phoenix, Arizona. Southwest's Route No. 76 runs from Medford, Oregon, to Los Angeles, California. The gap between the two systems, Los Angeles to Phoenix, which will be closed only if the Order here be affirmed, is almost as wide, 450 miles, as Bonanza's present route is long, 660 miles.

Bonanza's certificate is scheduled to expire on December 31, 1952, *unless* in the meantime an application for an extension be filed, which automatically would extend the effectiveness of the certificate under Section 9(b) of the Administrative Procedure Act until the Board had acted upon the petition, and *unless* the certificate be extended by the Board on its own initiative or under petition from Bonanza.

The sketchy history of the feeder airlines set out in this brief is sufficient to affirm that Bonanza's certificate is not going to come to an end on December 31, 1952. If this historical cloak were not acceptable proof the Board's quoted order of investigation would be quite sufficient.

It is doubtful, indeed improbable, that the investigation relating to the integration of the two feeder systems will be completed by December 31, 1952. But should the investigation be expedited, completion could hardly be

more than a few weeks ahead of that date. Surely the Board would not subject Southwest and Bonanza to the expense of going through a full-scale hearing of that nature and importance if it had seriously in mind any thought of not renewing Bonanza's certificate. Likewise, the Board would have to be charged with improvidence and indifference had it initiated the investigatory proceeding without first entertaining a strong view that integration of the two routes would be sensible. If integrated, Bonanza's system, plus the new route between Phoenix and Los Angeles, necessarily would have to be extended to September 30, 1954, which marks the theoretical end of Southwest's new term.<sup>21</sup>

Thus, Bonanza's system is almost certain to be alive until September 30, 1954. On that date Southwest (presumably as enlarged to extend down to San Diego, across to Phoenix, and U'd back up to Reno) would have been in operation almost eight years since its inauguration on December 6, 1946. That system will not come to an end on September 30, 1954, or at any other date, and the Los Angeles-Phoenix segment is not going to be chopped out in order that the "temporary suspension" of Western's Imperial Valley segment can be restored.

The narration of the origin and development of feeder service invalidates the claim that the Board has any serious intention of ever restoring Western's San Diego-El Centro-Yuma segment should its Order here be affirmed. Of the 22 franchised feeders, only one, Florida Airways, has been cancelled out by the Board's refusal to extend the certificate. The operation of Florida Airways was

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<sup>21</sup>*Southwest Renewal-United Suspension Case*, Order No. E-6063, January 29, 1952.

hopelessly and helplessly inept and of such negative value to the public that there was no conceivable justification for attempting to inject any more artificial life into it. The collapse of Florida affords no basis for arguing that the feeders are only temporary.

In a dissenting opinion in the Trans-Texas Certificate Renewal Case, Docket No. 3720, Board member Jones noted that the feeder system is “becoming so firmly imbedded in our transportation network” that “there is no blinking the fact that . . . extension (of feeders) for a term of years, regardless of how it is hedged about with language calling it an ‘experiment,’ amounts to a permanent authorization.”

The simple fact is that the feeders are here to stay. If Western’s Imperial Valley segment be “suspended” in favor of Bonanza, never again will Western serve that segment. This is revocation, not suspension.

### (c) Applicable Legal Principles.

Section 401(h) has not before been subjected to court interpretation. Hence, the approach can be fresh, neither aided nor hampered by precedent.

Isolated from the remainder of the Act, Section 401(h) is not as clear as it might be. But when read with other pertinent sections and with the Act as a whole the ambiguities dissolve and the real meaning and intention of the Section comes in clear range.

The Section involves two separate powers concerning certificates—suspension and revocation. An important difference exists between the two powers and it is essential that this difference be recognized and affirmed before the section can be applied validly, with respect either to suspension or to revocation.

(i) SUSPENSION AND REVOCATION POWERS DIFFER.

The Board and Bonanza may contend in effect that the power of suspension and the power of revocation are coexistent, coextensive and completely overlapping with the exception that suspension, either in whole or in part, must be supported by public convenience and necessity, whereas revocation, either in whole or in part, may be invoked only for an uncured default by the carrier. Thus, so the argument might go, with the power of suspension the Board may do to a certificate whatever it chooses under the cloak of public convenience and necessity, including the equivalent of revocation, either in whole or in part. Running hand in hand with this power, the argument may continue, is the power to revoke a certificate in whole or in part, even though the service may be required by the public convenience and necessity, if the carrier be in default and fail to cure the default on reasonable notice. This reasoning would torture the Section and ignore the essence of the Act as a whole.

The argument is downed by the simple admission, which must be conceded, that the public convenience and necessity would require the suspension of service by a defaulting carrier. Thus there would be no need to have a separate revocation provision if, in fact, the two powers were coexistent and coextensive, excepting only that the one is dependent on the public convenience and necessity and the other on an uncured default.

Whatever ambiguities may be detected in the Section at first blush, it is hardly to be said that Congress did not intend to place a high fence around the Board's revocation power and that a significant distinction between suspension and revocation was intended. One difference is

that suspension is temporary, with full reversionary rights upon removal of the ground for suspension, while revocation is permanent and wholly devoid of reversionary rights.

To affirm the distinction between suspension and revocation in Section 401(h), it is only necessary to turn to Section 402(g) concerning foreign air carriers, which reads:

“Any permit issued under the provisions of this Section may, after notice and hearing, be altered, modified, amended, *suspended*, cancelled or *revoked* by the Authority whenever it finds such action to be in the public interest.”

With *foreign flag* carriers, beneficiaries of the Board's certificate-issuing power under Section 402(a), a certificate may be suspended *or* revoked if dictated by the public interest. Revocation of the rights of a foreign flag carrier is not limited to an uncured default.

To suspend, according to Webster, means “to debar *temporarily* from any privilege . . .; to cause to cease *for a time* . . .; to stop *temporarily* . . .; to make *temporarily* inoperative.”

To revoke, according to the same authority, is “to annul by recalling or taking back; to repeal; rescind.”

The one is temporary, the other is permanent.

Thus it is that Congress knowingly and wisely cloaked *American flag* domestic operations with stability and permanency, except for an uncured default.

To argue, as the Board and Bonanza may, that the right of suspension and the right of revocation are co-equal and coexistent, differing only in the justification for action, public convenience and necessity or uncured de-

fault, is to flaunt the legal principle that use of different language in a statute indicates an intended different result. The principle is stated concisely in American Jurisprudence:

“The use by the legislature of certain language in one instance and wholly different language in the other, indicates that different results were intended, and the courts have even so presumed. Under this rule, where language is used in one section of a statute different from that used in other sections of the same chapter, it is to be presumed that the language is used with a different intent. Accordingly, the presence of a provision in one section of a statute and its absence from another are an argument against reading it as implied by the section from which it is omitted.” (50 Am. Jur. 261, 274.)

The facts and the surrounding circumstances point only to the permanent ejection of Western from its Imperial Valley operation on the El Centro-Yuma segment of its Route 13. This means that Western's Route 13 has been revoked in part contrary to the procedure set up by Section 401(h).

**2. The Suspension Provisions of Section 401(h) of the Act Do Not Permit the Elimination of a Permanently Certificated Air Carrier to Make Room for a New Air Carrier.**

**(a) Stability Is the Essence of the Civil Aeronautics Act.**

Even though it could be assumed that the removal of Western from El Centro and Yuma was intended to be and will be temporary only, and thus a suspension rather than a revocation, the suspension part of Section 401(h) does not give the Board the power to do what it attempted to do here.

One of the major purposes of the Civil Aeronautics Act was to lend stability to the then (and still) growing air transportation industry.

Concerning H. R. 9738, this statement appears in 83 Congressional Record at page 5960:

“ . . . if this legislation is enacted, the air carriers will be able to operate on a *stable* basis, their routes *secured* by a certificate of convenience and necessity which may be *revoked only for cause* . . . .”

At page 6406 of the same record, Congressman Lea, floor manager of the bill, is quoted in this manner:

“However, in the absence of legislation such as we have now before us, the lines are going to find it very difficult, if not impossible, to finance their operations because of the lack of *stability and assurance in their operations*. You would not want to invest \$200.00 or \$2,000.00 a mile in a line that has no *assurance of security of its route* and no protection against cutthroat competition.

“Part of the proposal here is that the regulatory body created by the bill will have the authority to issue certificates of convenience and necessity to the operators. *This will give assurance of security of route.*”

On page 8500 Congressman Lea is quoted again:

“In my judgment, . . . *two things are the fundamental and essential needs of aviation at this time, security and stability in the route* and protection against cutthroat competition. . . . We want to give financial stability to these companies so they can finance their operations and finance them to advantage.”

The insistent and predominating need of stability and some semblance of permanency in the industry was recognized by the Federal Aviation Commission implemented by President Roosevelt prior to the Civil Aeronautics Act to investigate the then infant and confused air transportation industry and recommend appropriate legislation. In the report of that Commission, dated January 30, 1935, which appears as Senate Document No. 15 of the 74th Congress, First Session, in Volume IV, commencing at page 9898, this lucid and prescient statement is found:

*“ . . . The air transport map cannot be redrawn every few years without utterly disastrous effect on the service. New lines ought to be created on a substantially permanent basis. An air line cannot be casually torn up and transplanted. The fixed investment in land, buildings, and equipment, of a major airline ranges, according to the best information that we can secure, from \$200 to \$500 per mile of route. While there are lines that have not a penny of such investment, and that depend entirely on rental of existing structures and services, they do not seem to us to offer an ideal example of the type of service that ought to be developed in the future.”*

The report of this Commission played a major part in the enactment of the Civil Aeronautics Act of 1938.

Similar recognition of the importance of stability and permanency was engraved in the report of the Air Policy Commission created by President Truman to assist him in formulating an integrated national aviation policy. This report, dated January 1, 1948, almost ten years after the Civil Aeronautics Act came into being and when the industry was less juvenile though perhaps still somewhat confused, appears in a volume titled “Survival in

the Air Age," printed by the United States Government Printing Office. The point under discussion was given consideration in this language commencing on page 110:

*"Domestic route pattern.*—The problem whether there is too much or too little competition in our domestic, air-transport system involves not only the question of new entries into the field and competitive extensions of the routes of existing companies, but also the important question whether combination of existing companies should be encouraged or prevented by the Board.

"We recommend that the Civil Aeronautics Board defer for a short time decisions in new route certification cases. This should not be confused with a freezing of the present route pattern, which would certainly be undesirable. There is, however, a widespread confusion as to the principles which guide the Civil Aeronautics Board in its route determinations. A body which is under the constant pressure of daily decisions of case after case cannot accomplish the careful planning which the development of a national route pattern demands. The present air transportation system has not developed as expected before and during the war. There is need for a comprehensive survey of the present situation and the development of a more cohesive philosophy. The resulting clarification of policy should bring about acceleration of subsequent route decisions.

"As a part of such review, if the Board should find *any routes no longer now required by public convenience and necessity*, it should use any present legal powers such as suspension or reduction of 'need' payments to reduce the effect of any errors in the present system. *This appears preferable to causing instability in the industry through granting to the Board the right of outright revocation of routes.*"

Here the Commission recognized the propriety of the right of temporary suspension when the public *no longer requires* the service, if, perhaps, an army base should be decommissioned or nearby mines exhausted, examples later noted in this brief. At the same time the Commission recognized the instability that would follow the power of effecting outright revocations.

It is of no small significance that the report of President Roosevelt's Federal Aviation Commission was written before Section 401(h) was placed on the books, whereas the report of President Truman's Air Policy Commission was written after that Section had been on the books close to ten years. Still, both Commissions heeded the importance of stability. Moreover, the last Commission did not find in Section 401(h) the great and grave powers the Board now seeks to read into it.

That the Board members are not always indifferent to the problem is indicated by this quotation from an article by Member Ryan:

*“ . . . In view of the protection afforded by the certificate, which for almost ten years has been the foundation of the stability of the private investments dedicated to the public service of air transportation, it is not surprising that Congress should impart to a certificate a certain stability by providing that it should be subject to revocation only for statutory cause and not pursuant to a mere change of mind on the part of the Board.”*<sup>22</sup>

The Act itself sets up a guide that is clear and compelling. Section 2 reads in full:

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<sup>22</sup>Ryan, *The Revocation of an Airline Certificate of Public Convenience and Necessity*, 15 J. of Air Law and Commerce, 377, 385 (1948).

“DECLARATION OF POLICY.

Sec. 2. In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.”

(b) **Public Convenience and Necessity Require Stability in the Air Transportation Industry.**

Implementation of the suspension power granted by 401(h) must be based on public convenience and necessity. Section 2 requires the Board to consider as being in accordance with the public convenience and necessity the regulation of air transportation in such manner as to foster *sound economic conditions* and to improve the relations between air carriers as well as to promote adequate, economical and efficient service by air carriers at reasonable charges.

If, under the guise of suspension (or revocation), the Board could reshuffle or remake the domestic air route pattern, one step of which is evidenced here, all semblance of stability and permanence would vanish. This would not foster sound economic conditions in air transportation. Nor would adequate, economical and efficient service by air carriers at reasonable charges be promoted if each individual carrier were faced with the ever present threat of having its route structure slashed or patched by suspensions to match the current whim of the Board.

If, with the sword of suspension, the Board can hack a point or segment out of a carrier's permanent certificate to make room for a new or different carrier, the power of the Board to remake the entire domestic air route pattern is complete.

The public interest in stability of utility franchises is noted by Ford P. Hall, Professor of Government, Indiana University, in the Third Edition of his textbook captioned "Government and Business" at page 182:

"Franchises may be classified as follows: perpetual franchises, long-term franchises, short-term franchises, and indeterminate permits. Perpetual fran-

chises, although not common, have sometimes been granted. The short-term franchises running for five or ten years have often been employed. The uncertainty of renewal has made them highly unsatisfactory from the point of view of the utility. As a result, the public might suffer because of the unwillingness of the utility to extend service because of uncertainty as to its future status. In general, the long-term franchise has been more satisfactory."

In the same authoritative textbook, at page 142, Professor Hall remarked:

"After all, it is the convenience and necessity of the whole public and not a small group which must be considered. Furthermore, not only the convenience and necessity of the moment but also that over a long period of time must be considered."

Here the public convenience and necessity, the whole public, will be delivered a shattering turn if impermanence and instability are admitted to the air transportation industry simply to provide a slightly different air service to a relatively small area of the country by a new carrier at the cost of ousting the old carrier. That instability will infect United, TWA, and all of the other great American flag trunklines, big and small.

Western's operation from San Diego to El Centro to Yuma and back is exactly the same as Western's operation from San Francisco to Portland to Seattle and back, except for length and traffic density. El Centro and Yuma, as the Board fully recognizes, are served as an extension of Route 13 out of San Diego. Portland and Seattle are served as an extension of Route 63 out of San Francisco. One involves 151 miles and a total population of 21,735. The other involves 681 miles, with a

population of 841,219. But here the difference vanishes. The principle remains identical. So it is if the Board under the pretense of suspension can eliminate Western from El Centro and Yuma it can eliminate Western from Portland and Seattle just as quickly and in precisely the same fashion.

Should 401(h) be construed by this Court as the Board seeks to have it construed, the Board's power over the American flag domestic air transportation industry would be boundless and could be despotic. Had Congress willed to grant this awesome power, the intention would not have been buried in the cloudy language of 401(h).

**(c) Other Sections Confirm the Limitations of 401(h).**

In addition to Section 2 of the Act, which is clear enough, Sections 401(d)(2) and 401(e)(1), both of which are set forth in Appendix B of this brief, affirm that the suspension power under 401(h) was not designed to be used as the Board is now seeking to use it.

Section 401(d)(2) provides for the issuance of temporary certificates "for such limited periods as may be required by the public convenience and necessity." There would be no need for temporary certificates if the Board, in fact, had the power it professes to have under the suspension portion of 401(h).

Section 401(e)(1), commonly called the "grandfather clause," required the issuance of certificates to carriers which were in operation at the time the Act became effective. The grant of certificates under the grandfather clause was not dependent upon public convenience and necessity. Unquestionably it was recognized by Congress, as in other common carrier and public utility inactments,

that fair treatment and stability were of major importance. Even though some bad routes, or malformed routes, were inherited permanently under the grandfather clause, and this occurred, fairness and stability rightly prevailed.

The grandfather clause of the Act would have been stripped of meaning if the day after a grandfather certificate had been issued to the Board had only to flip over to 401(h) and revoke it through the suspension loophole.

**(d) The Limited Suspension Powers Under 401(h) Are Important.**

It is not argued by Western that the suspension part of 401(h) is meaningless or, when properly construed, valueless to the Board's important functions as guided by the declaration of policy in Section 2. It is entirely right that the Board should have reasonable suspension power. It would be wrong if the Board stood unarmed when a once-needed air service became useless. But this weapon rightly should be sheathed against a use that could be unfair and that could corrode stability.

If a once sizeable and prosperous community, then needing and supporting air service, become impoverished and depopulated because of the exhaustion of nearby mines (as has happened) or because of the decommissioning of a major army base (as has happened), the Board should have the right upon petition, complaint, or its own initiative, after notice and hearing, to suspend the service. It would not be right to require the carrier to apply for abandonment under 401(k), since the mines might be revived or the base recommissioned, as abandonment would be permanent with no reversionary rights. It would not be right to compel the Board to await a de-

fault by the carrier which would give rise to a permanent revocation.

That, clearly, is an example of the proper interpretation and application of the suspension power under 401(h). And the propriety of this application of the Section would not be affected by the existence of a condition—the exhaustion of mines or the decommissioning of an army base—requiring an indefinite suspension which by the passage of time might prove to be permanent. The suspended carrier still would not be forfeiting involuntarily a right in favor of a newcomer. The carrier still would know that if the mines were ever revived or the base remanned its operations would be resumed. And the Board would not be vested with the power to remake the air route map from time to time to suit its own fancy.

Other examples of a proper and sensible application of the suspension powers under 401(h) could be given. The dust-bowl catastrophe of some years back brings to mind that wholesale emigration from an area because of a drought might require, in the public convenience and necessity, suspension of air service at one or more points. An improbable and hideous thought, but war with a neighbor might call for suspension of service at border and near-border stations. And an amended treaty could require the suspension of Western's service to Edmonton, Canada, or Amerian Air Lines' service to Mexico City. But in all of these cases the suspended carrier would get its rights back once the convenient and necessary condition warranting the suspension had dissolved.

Use of the suspension power to provide for discontinuance for the time being of an air service which becomes unneeded or impossible of performance, without

forcing the carrier to seek permanent abandonment or to invite permanent revocation by a willful default, is entirely fair and fosters stability and sound economic conditions in the industry. Use of the suspension power, as the Board here seeks to use it, to revise the route pattern and to take out an existing carrier which has done an adequate job and is not in default to make room for a newcomer is not compatible with fairness, stability and the other principles laid down in Section 2 of the Act.

**3. Elimination of Western From El Centro and Yuma, Either by Suspension or Revocation, Without Just Compensation for Lost Property Rights Is in Violation of the Fifth Amendment of the Constitution.**

Inasmuch as each of the first two arguments appears to be conclusive, but little space need be devoted to the proposition that the manner in which the Board has attempted to dispossess Western from the Imperial Valley segment of its Route 13 is in violation of the Fifth Amendment of the United States Constitution. The point is presented largely that it may not be deemed waived.

It is to be expected that the Board will counter this reasoning by citing 401(j) of the Act, which reads:

“Certain Rights Not Conferred by Certificate.

(j) No certificate shall confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing area, or air-navigation facility.”

This Section does not nullify the argument, nor does it give the Board the power to take or dispose of property of a carrier without just compensation. Western is not claiming that the Imperial Valley segment of its Route 13

gives it a proprietary or property right in the use "of any air space, civil airway, landing area, or air navigation facility." It is not the loss of this which forms the base of Western's claim.

Were the Board's Order to stand, Western will lose the investment it has made, largely in the form of early-stage operation losses totaling around \$100,000.00, in developing the Imperial Valley air traffic to its present point of profit. Western will lose the future profits from the segment which, but for the revocation in part of Route 13, should be sustaining and substantial. It is to be anticipated that Western will suffer a loss on its ground equipment at El Centro and Yuma, either in consequence of non-user, because of a forced sale or because of cost of transferring the equipment to other system points.

For the base of this argument it is unnecessary to attempt to reduce to dollars the loss which would be sustained by Western. The fact is that the amount involved is significant and the loss relates to property rights, exclusive of the rights in the certificate, which would be taken from Western by the Board's Order.

It is unthinkable that either the framers of the Constitution or Congress intended that a pioneering air carrier should spend money, time and effort in developing and promoting traffic in a virgin area only to have the results taken away from it and handed over gratis to a newcomer for harvesting.

These judicial statements frame the point with validity:

"Though property of a carrier be dedicated to a public use, it remains private property of the owner and may not be taken without just compensation. The carriers have not ceased to be privately operated

and privately owned however much subject to regulation in the interests of interstate commerce. There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employees.” (p. 357.)

\* \* \* \* \*

“All agree that the pertinent provisions of the Constitution in issue are Article I, Section 8, Clause 3, which confers the power on Congress to regulate commerce among the several states, and that this power must be exercised in subjection to the guarantee of due process of law found in the Fifth Amendment.” (p. 347.)

*Railroad Retirement Board v. Alton Railway*, 295 U. S. 330, 79 L. Ed. 1468 (1934).

\* \* \* \* \*

“Congress may not, under the commerce clause or otherwise, take property of one without compensation and transfer it to another even for a valid public purpose.” (p. 550.)

*United States v. Rock Royal Cooperative*, 26 Fed. Supp. 534 (D. C., N. D., New York, 1939).

\* \* \* \* \*

“The Fifth Amendment by implication forbids the taking, even under the authority of Congress, of the private property of one person and giving of it to another. Also it is to be noted that the state cannot take private property of one for the use of another, even when regulating an industry touched with public interest or for public welfare.” (p. 308.)

*Hudson Duncan Company v. Wallace*, 21 Fed. Supp. 295 (D. C., Oregon, 1937).

The Board's cuffing of the Fifth Amendment is neither answered nor excused by the fact, should it be a fact, that in due time Western might derive some compensation for the taking through a more generous mail rate.

In appraising this point note should be taken that if the Board have the power to deprive Western of its property rights at El Centro and Yuma, comparably small, the same uncompensated deprivation can be accomplished at Seattle and Portland where the amount involved would be a major figure.

### Conclusion.

Justification for the great power arrogated by the Board under 401(h) must not be founded on the fact that in the national scheme of things El Centro and Yuma appear relatively unimportant. Nor may justification be found in the assertion that the Board will never abuse or misuse the power. If the Board can cut off the El Centro-Yuma segment of Western's Route 13 at San Diego and give it to Bonanza it can cut off the Portland-Seattle segment of Western's Route 63 at San Francisco and give it to Southwest. That the Board might never dare go so far is no warrant for allowing the first wedge to be entered. Should the Board's Order here be affirmed, a harassing precedent would be established which would require affirmance of an Order truncating Western's Portland-Seattle segment back to San Francisco under comparable circumstances.

Section 401(h) should be interpreted by this Court in a manner that will eliminate the destructive consequences of the instability in the air transportation industry which would follow the right of the Board to recast the domestic air route pattern without the consent of the affected carriers and solely in response to the Board's fluid interpretation at the moment of what might suit the public convenience and necessity.

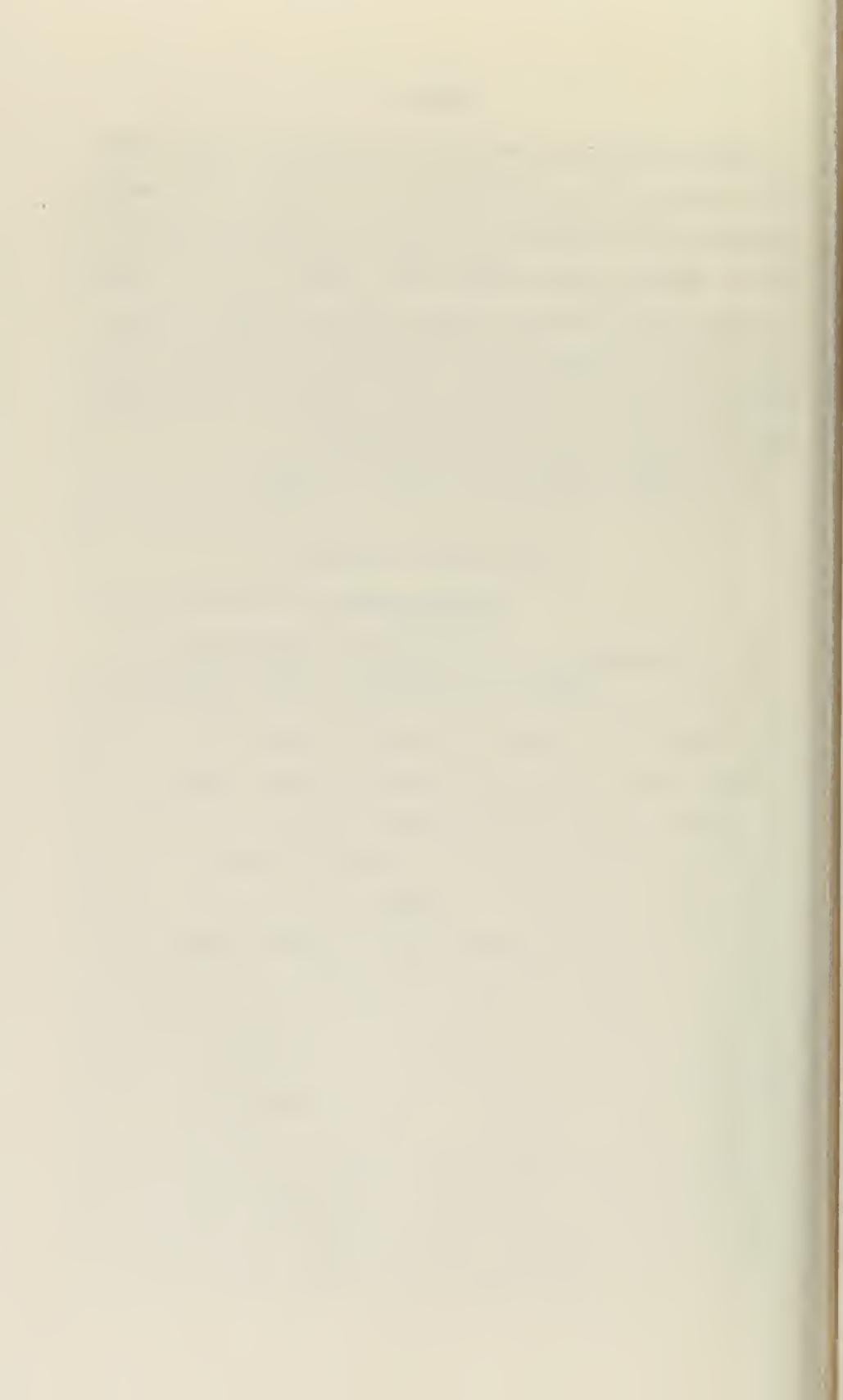
Los Angeles, California, March 7, 1952.

Respectfully submitted,

GUTHRIE, DARLING & SHATTUCK,

By HUGH W. DARLING,

*Attorneys for Western Air Lines, Inc.*

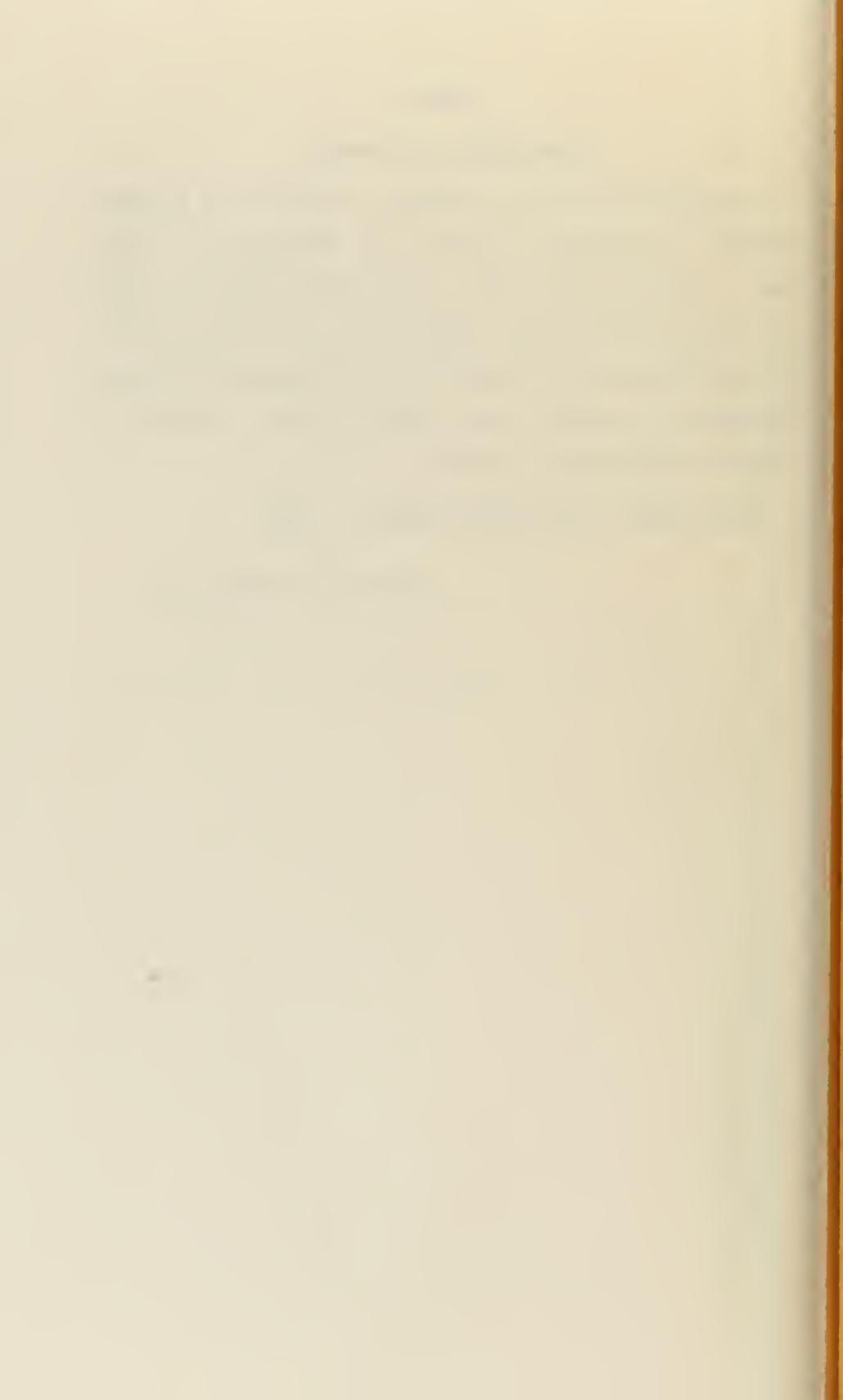


**Certificate of Service.**

I certify that I am an associate of the firm of Guthrie, Darling & Shattuck, attorneys for Western Air Lines, Inc., and that on this date I will have caused this brief to be served upon the attorneys for Civil Aeronautics Board, Bonanza Air Lines, Inc., and Southwest Airways Company by mailing three copies to each, properly addressed with postage prepaid.

Los Angeles, California, March 7, 1952.

FRANK DE MARCO JR.







## APPENDIX "A."

UNITED STATES OF AMERICA  
CIVIL AERONAUTICS BOARD  
WASHINGTON, D. C.

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Served: Jan. 17, 1952.

Docket No. 2019 *et al.*

Reopened Additional California-Nevada Service Case.

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Decided: January 17, 1952.

Certificate of public convenience and necessity of Bonanza Air Lines, Inc., for route No. 105 amended to authorize service, with certain limitations, between the coterminal points Los Angeles and Long Beach, Calif., and Phoenix, Ariz., via the intermediate points Santa Ana-Laguna Beach, Oceanside, San Diego, and El Centro, Calif., Yuma and Ajo, Ariz., and Blythe, Calif.

Certificate of public convenience and necessity of Western Air Lines, Inc., for route No. 13 temporarily suspended, insofar as it authorizes service to El Centro, Calif., and Yuma, Ariz.

Certificate of public convenience and necessity of Frontier Airlines, Inc., for route No. 93 temporarily suspended, insofar as it authorizes service on segment 1 between Yuma and Phoenix via Ajo, Ariz.

Western's authority to serve San Bernardino and Palm Springs, Calif., not suspended.

Except, as otherwise above indicated, application for additional local air service in California and Arizona denied.

Appearances:

E. W. Jennes, Paul D. Lagomareini, and Howard C. Westwood for American Airlines, Inc.

Alexander C. Dick, G. Robert Henry, and Frank W. Beer for Bonanza Airlines, Inc.

Harry A. Bowen and Emil N. Levin for Frontier Airlines, Inc.

Martin J. Burke and W. Clifton Stone for Los Angeles Airways, Inc.

Walter Roche, C. Edward Leasure and H. F. Scheurer, Jr., for Southwest Airways Company.

James K. Crimins and Henry P. Bevans for Trans World Airlines, Inc.

Floyd M. Rett, John T. Lorch and James Francis Reilly for United Air Lines, Inc.

D. P. Renda and Donald K. Hall for Western Air Lines, Inc.

James A. Murphy for the State of Arizona Corporation Commission and Greater Arizona, Inc.

Robert H. Berlin and Chester K. Hendricks for the city of Banning, Calif.

Edward A. Hass for the Beaumont Chamber of Commerce.

Wayne H. Fisher and W. M. Blaszc for the city of Blythe.

Seraphim B. Perreault for the Brawley Chamber of Commerce.

Perry Perreault for the city of Brawley, Calif.

W. G. Duflock for the city of El Centro and the El Centro Chamber of Commerce.

Alexander W. Staples for the city of Indio.

Russell W. Rink for the city of Palm Springs.

Roy D. Boles for the city of Ontario.

Eugene Best for the city of Riverside.

T. T. Hannah for the county of Riverside.

A. W. Walker for the county of San Bernardino.

Harold G. Lord for the city of San Bernardino.

George Kerrigan for the city of San Diego.

John B. Wisely, Jr. and Harold C. Giss for the city and county of Yuma.

Julian T. Cromelin and Frank J. Delany for the Post Office Department.

Ronald H. Cohen and Ernest Nash, Public Counsel.

Dean E. Howell for the County of San Diego.

John T. Kimball for the Phoenix Chamber of Commerce.

Nicholas Udall for the city of Phoenix.

John B. Lydick for the County of Imperial.

John H. L. Bate for the Harbor Commission—Port of San Diego.

## Opinion.

By the Board:

In this proceeding, we are once again presented with the question of the local air service needs of the Los Angeles-San Diego-Phoenix area.<sup>1</sup>

A public hearing was held before Examiner F. Merritt Ruhlen, and his report was served on the parties on August 17, 1951. The Report recommended, *inter alia*, that local air service be provided between San Diego and Phoenix via El Centro, Yuma, and Ajo, and that Western Air Lines, Inc. (Western), rather than either of the local service applicants, Southwest Airways Co. (Southwest), or Bonanza Air Lines, Inc. (Bonanza), be selected to render the service. The Examiner found that local service between Los Angeles and San Diego via Santa Ana-Laguna Beach and Oceanside, and between Los Angeles and Phoenix via San Bernardino, Palm Springs, or to any of the other cities for which application for such service was made is *not* required. The Examiner also recommended the suspension of Frontier Airlines, Inc.'s (Frontier), authority to serve Yuma-Ajo-Phoenix, and Western's authority to operate flights between San Bernardino or Palm Springs on the one hand, and El Centro-Yuma on the other.

Exceptions to the Examiner's Report were filed by Southwest, Bonanza, Frontier, United Air Lines, Inc. (United), and Western, and except for United which called attention to its brief before the Examiner, each of the foregoing parties filed briefs in support of their exceptions. The aforementioned parties and certain civic

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<sup>1</sup>See Appendix, pp. 22-26, for a statement of our previous consideration of this matter.

intervenors also appeared in oral argument before the Board.

Attached hereto as an Appendix are portions of the Examiner's Report containing the findings, conclusions, and recommendations with which we agree, and adopt as our own. We shall discuss herein principally those matters on which we have reached a conclusion different from that recommended in the Report, and those contentions of the parties which warrant further expression of our views.

*Los Angeles, Santa Ana-Laguna Beach, Oceanside, San Diego Service.*

In a supplemental decision in the original California-Nevada Service Case, we found a need for local air service to Santa Ana-Laguna Beach, Oceanside, and San Diego as part of a Los Angeles-Phoenix route as well as a need for local air service to El Centro, Yuma, and Ajo.<sup>2</sup> We have carefully considered the record in this, the reopened proceeding, and find no basis therein for changing our original conclusion as to the need for a local Los Angeles-San Diego service as part of a Los Angeles-Phoenix local service route.

As we previously noted, because the area around Los Angeles is heavily built up and traffic congestion is increasing, travel by automobile from Santa Ana or Laguna Beach to the Los Angeles and Long Beach municipal airports is comparatively slow. Air service to these two communities would make convenient transportation available to the north and east through trunkline connections at either Los Angeles or San Diego. As for Oceanside,

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<sup>2</sup>Additional California-Nevada Service Case, Los Angeles-San Diego-Phoenix, 11 C. A. B. 39, 40-45.

it is not within convenient driving distance of either Santa Ana or San Diego, and its economic strength, plus its location near the Pendleton marine base, indicate that it would benefit from local air service.

Moreover, if the local service route between Phoenix and San Diego is not extended to Los Angeles, a considerable amount of the local traffic will be inconvenienced. There is no question that for the cities east of San Diego, such as El Centro, Yuma, Ajo, and Blythe,<sup>3</sup> Los Angeles is the western point of greatest traffic attraction. Terminating the San Diego-Phoenix local service route short of Los Angeles would inhibit the full development of the local service traffic potential since the relative time and service advantage of air transportation over surface transportation for the relatively short distances here involved would be watered down by the necessity of using a connecting service.

If, as we have found, Los Angeles is the appropriate terminal for the local service route east of San Diego to be certificated herein, the additional certification of local service stops between San Diego and Los Angeles appears to be in the public interest since the added cost of this local service experiment between these points would consist primarily of the added station expenses.<sup>4</sup> Moreover, the addition of two intermediate points between San Diego and Los Angeles is desirable to discourage the carrier from competing for terminal-to-terminal traffic between Los Angeles and San Diego. We concur in the Examiner's conclusion that additional Los Angeles-

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<sup>3</sup>See pages 8-9, *infra*.

<sup>4</sup>Some additional flight costs are also involved since it is relatively more expensive to land or take off an aircraft at a point than to overfly it, but these costs are not substantial.

San Diego terminal-to-terminal service does not appear required by the public convenience and necessity. We recognize that some terminal-to-terminal traffic will fly on the local service carrier's aircraft. However, we feel that the amount of diversion from the nonstop services currently certificated between these points that will result from a local air service in smaller, slower aircraft should not be substantial.

We have considered also the effect of our decision on Los Angeles Airways authority to operate a local service route with rotary-wing aircraft in the Los Angeles area which would, of course, be duplicated in part by the Santa Ana-Laguna Beach-Los Angeles segment here found to be required by the public convenience and necessity. However, the date on which Los Angeles Airways will inaugurate passenger service between these points is still in the indefinite future, and the extent of public acceptance of transportation by rotary-wing aircraft is still unknown. In any case, we believe that the amount of diversion of Los Angeles' traffic would be negligible.

With respect to Oceanside, the principal contention adverse to its certification is that the only suitable airport, that at the Pendleton marine base, is not available for civilian use. While the record is inconclusive as to the availability of this airport, we note that other military airports in the same section of the country are being used by civil air carriers, and it is reasonable to expect that similar arrangements could be made in this case, especially where the inauguration of such service would be a substantial convenience to the military personnel stationed there.

*Local Air Service to Blythe, Calif.*

The Examiner's Report recommended against the inauguration of a local service experiment to the city of Blythe, Calif., although recognizing that the community is a relatively isolated one. However, the Report did not consider the possible inclusion of the point on the San Diego-Phoenix local service segment but only on a Los Angeles-Phoenix route via Palm Springs and San Bernardino, a segment which was not found to be required by the public convenience and necessity, a conclusion with which we do not quarrel.

On the other hand, we have considered the possible inclusion of Blythe on the local service route between San Diego and Phoenix, and have determined that the inauguration of air service to Blythe on that route is required by the public convenience and necessity.

Blythe is located 238 miles southeast of Los Angeles, 156 miles northwest of Phoenix and about 65 miles northwest of Yuma. Its 1950 population was 4,086 representing a 73.5% increase over its 1940 population. In the immediate surrounding territory there are an additional 6,000 people, making a total of about 10,000 persons living in this community. It is primarily an agricultural community in an area of considerable agricultural wealth. In addition, it has some manufacturing including one of the largest gypsum plants in the United States.

Blythe's primary communities of interest are with Los Angeles and Phoenix. In a representative 30-day period in 1950, it is estimated that over 7,000 persons from Los Angeles were registered in Blythe hotels, and over 1,000 from Phoenix. A secondary community of interest is similarly indicated with San Diego and Yuma.

There is no passenger rail service available at Blythe. Bus transportation, which is available, takes 4 hours to Phoenix and about 6 to 7 hours to Los Angeles. Among other testimony as to relative inconvenience of current mail service, there is evidence in the record that mail deposited in the morning at Blythe frequently is not delivered in Los Angeles until 48 hours later.

Blythe could be served by air between Yuma and Phoenix as an alternate intermediate point to Ajo, in which case the additional costs of inaugurating a local air service experiment to the point would consist principally of the added station costs, and flight costs for an additional 35 miles between Yuma and Phoenix for the added circuitry of such route over a flight between such points via Ajo.

Based upon the foregoing considerations and all the facts of record, we find that the public convenience and necessity require the provision of a local air service between the coterminal points Los Angeles and Long Beach, Calif., and the terminal point Phoenix, Ariz., via Santa Ana-Laguna Beach, Oceanside, San Diego, and El Centro, Calif., Yuma and Ajo, Ariz., and Blythe, Calif., with Blythe and Ajo being served on alternate flights.

#### SELECTION OF CARRIER.

As previously noted, the Board in its original decision herein awarded the above route (with the exception of Blythe) to Southwest<sup>5</sup> (11 C. A. B. 39). However, prior to the date upon which the award would have become effective, the Board, after consideration of petitions for rehearing, reargument, and reconsideration filed by

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<sup>5</sup>The choice of carrier was between Western, a trunk carrier, and Southwest, a local service carrier, since Bonanza was not then a party to the proceeding.

several parties to the proceeding, alleging, *inter alia*, that the Board's award to Southwest was, in part, outside the issues in the proceeding and could not be supported by the record therein, vacated such award.<sup>6</sup> The order set Southwest's application down for further hearing, permitted such application to be amended to place squarely in issue a Los Angeles-Phoenix local air service via San Diego, and consolidated into the reopened proceeding those parts of its previous decision as related to suspending portions of Western's and Arizona's (Frontier's predecessor) routes conflicting with a possible Los Angeles-San Diego-Phoenix local service route.

Southwest argues that this order was legally deficient insofar as it purported to rescind the route awarded to Southwest. It is the carrier's position that, under the provisions of section 401(g) of the Act,<sup>7</sup> a certificate once issued to a carrier may not be rescinded even *prior* to the date upon which it is to become effective except upon compliance with the requirements of section 401(h) of the Act; to-wit, after notice and hearing, and upon a showing of wilful failure to comply with a requirement of the Act, an applicable regulation, or a certificate condition, which after having been called to the carrier's attention was not corrected. We must reject this contention. Southwest was clearly on notice that the original award was subject to reconsideration and we are satis-

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<sup>6</sup>In Docket No. 2899, which was consolidated into this proceeding, Southwest had applied for a route extension from Los Angeles to San Diego, and from Los Angeles to Phoenix via various intermediate points. Southwest, however, had not specifically applied for a Los Angeles-Phoenix route via San Diego.

<sup>7</sup>As noted by the carrier, section 401(g) provides in part that "each certificate shall be effective from the date specified therein and shall continue in effect until suspended or revoked as hereinafter provided."

fied that the Board's action in reopening the proceeding was proper.<sup>8</sup> Our attention has not been directed to any contrary authority. We, therefore, do not feel inhibited in selecting a carrier by our previous decision to award a substantially similar route to Southwest.

Before proceeding further with our opinion as to the carrier to be designated, there is one additional point to be made. The Examiner noted, and we agree, that the selection of a carrier to render the local air service between San Diego and Phoenix necessarily involves the question of suspension of Western's authority at El Centro and Yuma, and Frontier's authority over its Yuma-Ajo-Phoenix segment since there is insufficient traffic potential at any of these points to justify service by more than a single carrier. Western seeks to inhibit our ability to select a carrier other than itself by challenging our authority to compel a certificated carrier to suspend service to a point for reasons other than misuser or default. We have on other occasions met similar challenges to our authority with a full expression of our

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<sup>8</sup>The certificate "issued" to Southwest which was attached to the Board's order (Serial No. E-3727, dated December 19, 1949) stated on its face: "This certificate, as amended, shall be effective on February 17, 1950: *Provided, however,* That prior to the date on which the certificate, as amended, would otherwise become effective the Board, either on its own initiative or upon the filing of a petition or petitions seeking reconsideration of the Board's order of December 19, 1949 (Serial No. E-3727), insofar as such order authorizes the issuance of this certificate, as amended, may by order or orders extend such effective date from time to time." (See 11 C. A. B. 39, 50-51.) The effective date of this certificate was extended to March 31, 1950 by Orders Serial Nos. E-3869 and E-3935, dated Feb. 2, 1950 and Feb. 24, 1950, respectively. Since the opinion in the Kansas City-Memphis-Florida Case, Supplemental Opinion, 9 C. A. B. 401 (1948), such a clause has been specifically inserted in each certificate to take care of situations such as this where the Board might reconsider and rescind the authorization granted in the original opinion. See 9 C. A. B. 401, 408.

views as to our power to so act.<sup>9</sup> We are not here presented with any new arguments which warrant further discussion.

As between choosing Western or one of the two local service carrier applicants, a decision is not difficult to reach. The considerations involved in our well-established policy favoring the award of local service routes to local service operators rather than trunk operators are squarely applicable here.<sup>10</sup> And on previous occasions we have applied this policy where Western was an applicant for a local service route,<sup>11</sup> and we are not here presented with any substantial change of circumstances or any new reasons justifying a different conclusion. Moreover, the history of Western's service to El Centro and Yuma<sup>12</sup> is such as to warrant an adverse conclusion as to Western's willingness to operate a truly local service route.

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<sup>9</sup>North Central Route Investigation, Docket No. 4603 *et al.*, Order Serial No. E-5952, adopted December 13, 1951; Wisconsin Central Renewal Case, Docket No. 4387 *et al.*, Order Serial No. E-5951, adopted December 13, 1951; Frontier Renewal Case, Docket No. 4340 *et al.*, Order Serial No. E-5702, adopted September 14, 1951; All American Airways, Inc., Suspension Case, 10 C. A. B. 24, 27-28; Caribbean Area Case, 9 C. A. B. 534, 545, 554.

<sup>10</sup>See, for example, Rocky Mountain States Air Service, 6 C. A. B. 695, 730-32 (1946); West Coast Case, 6 C. A. B. 961, 981 (1946); New England Case, 7 C. A. B. 27, 39 (1946); Texas-Oklahoma Case, 7 C. A. B. 481, 502 (1946). The award of local service route No. 106 to Mid-Continent Airlines, Inc., occurred under exceptional circumstances and was not intended to be a departure from our basic policy. See Parks Investigation Case, Order Serial No. E-4472, dated July 28, 1950, p. 22; also North Central Route Investigation Case, Order Serial No. E-5952, dated December 13, 1951, pp. 4-5.

<sup>11</sup>Rocky Mountain States Case, *supra*, p. 733; Additional California-Nevada Service Case, Supplemental Opinion, 11 C. A. B. 39, 41-42.

<sup>12</sup>See Appendix, pp. 56-59.

Even though Western could operate the local air service we find required by the public convenience and necessity, at a lower cost to the government, we may not permit that fact to be decisive. For if relative cost were the dominant criterion for the award of a new local air service, it would put an end to our policy of favoring independent local service carriers to operate local service routes.

Similarly, the conclusion that Western can offer more through service to the communities on the local service route than either of the other applicants does not especially buttress its case since it would be the rare instance where a trunk with its greater route mileage and number of communities served would not offer a through service to more traffic than would a feeder applicant for the same route. Thus, if this factor were to be considered decisive, the trunk applicant would ordinarily succeed to a local service route rather than the local service carrier applicant most qualified to render the local air service.

For these reasons, we conclude that one of the local service carrier applicants for the route should be preferred to Western.<sup>13</sup> A more difficult choice is presented with respect to selecting one of the latter applicants. No one has seriously contested Southwest's or Bonanza's fitness, willingness, and ability to conduct the required local air service, and we find they both meet the required statutory standard for the award of a route extension.

We have carefully considered the record in this proceeding in the light of the contentions of these applicants as to their relative ability to generate traffic and serve a

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<sup>13</sup>See pages 16-18 for additional discussion of our reasons for suspending Western's service at El Centro and Yuma.

local air service route and can find little in this regard to choose between them. Both have done a creditable job in exploiting the local service routes for which they have been certificated, and they appear equally capable of doing a similar job for the new Los Angeles-Phoenix route.

Moreover, we do not believe that the record demonstrates that this route can be more readily fitted into the route systems of either carrier for while the western end of the route is contiguous to the trade area now served by Southwest, the eastern end is contiguous to that served by Bonanza, and the cities in the center, that is, El Centro, Yuma, Blythe, and Ajo whose needs are our primary concern in this proceeding, can hardly be said to fall within the natural service orbit of either one. Nor do we believe that the selection of either carrier would impair the possibilities of integration of the carriers' routes since no matter which carrier is selected their routes would become contiguous.<sup>14</sup>

Southwest, in arguing for its selection rather than Bonanza, relies principally on the fact that it can operate the new service more economically. This position is supported by cost estimates submitted by Public Counsel. The estimated difference in cost of operation is 3.23 cents per plane mile in Southwest's favor.

On the other hand, Bonanza urges that it has a greater need than Southwest for additional route mileage and that this proceeding affords the most logical opportunity for strengthening its route pattern. Bonanza is one of the smallest local service carriers, having a route system of

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<sup>14</sup>See Southwest-West Coast Merger Case, Order Serial No. E-5594, adopted August 7, 1951, p. 4.

only 639 operable miles and serving only eight communities. On the other hand, while not numbered among the largest local service carriers, Southwest is twice the size of Bonanza and serves more than four times the number of communities; the area it serves is one of comparatively high population density and wealth.<sup>15</sup> With these advantages Southwest has progressed considerably further on the road to economic self-sufficiency than has Bonanza.

Bonanza is now severely hampered by a lack of sufficient traffic and revenue volume over which to spread its overhead costs, and it cannot obtain maximum utilization of its aircraft. In the year ending June 30, 1951, for example, its scheduled daily aircraft utilization was only 4:24 hours, compared with an average of 6:07 hours achieved by other local service operators using DC-3 equipment, and its total operating expense reached 103.70 cents per revenue mile as opposed to an industry average of 89.86 cents. There is no contention before us that the differences indicated by these figures are due to management deficiencies or other factors within the carrier's control, and familiar as we are with the influence of size on relative efficiency and cost, we accept the carrier's contention that the award of additional route miles to its system with the traffic and revenue potential available thereon would tend to lower its system unit operating costs and thus, to improve its economic position.

To the extent that Bonanza's system unit operating costs for its present route are reduced as a result of the route extension here awarded the carrier, the Govern-

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<sup>15</sup>These factors may also result in an advantage to Southwest in the comparative amount of off-line revenues which it might obtain if awarded the new segment rather than Bonanza. The amount of such revenues is not conclusively indicated by the record, but does not appear to be substantial.

ment will realize a saving in mail pay support for its current route. And, while due primarily to lower operating costs, Southwest would probably be able to operate the Los Angeles-Phoenix route with a lesser sum for mail pay support than will be required therefor by Bonanza, this advantage of Southwest's will tend to be offset by the mail pay support savings on Bonanza's present route.

Thus, after full consideration of the record in this proceeding in the light of the well-established Board policies with respect to the selection of carriers to operate local air service routes,<sup>16</sup> and with relation to the Board's responsibilities for the encouragement and development of a self-sufficient and adequate air transportation system, we have selected Bonanza as the carrier to be authorized to provide the required local air service.

Our conclusion that the public convenience and necessity require the route awarded Bonanza, as previously indicated, requires suspension of Western's service at El Centro and Yuma, and suspension of Frontier's authority to serve the Yuma-Ajo-Phoenix segment which has not been activated. In reaching our conclusion as to the carrier to be selected, we considered carefully the effect on the aforementioned communities of the new routing on which they would be placed, and of the change in carrier which would be rendering the service. We think the advantages to Ajo of having a direct one-carrier service to Los Angeles and Phoenix are obvious, and are more than sufficient to offset any other advantage over Bonanza that Frontier might claim on the record before us. The advantages to Yuma and El Centro of being placed on the new routing and of being given service by

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<sup>16</sup>See footnote 10, *supra*.

Bonanza are less tangible. Yuma will be benefited by being placed upon the route system of a single carrier rather than two. The traffic potential of Yuma is not sufficient for two carriers, and it is doubtful, therefore, whether it would be given the same quality of service by two carriers as it would by one. And both El Centro and Yuma should receive improved service through being served by a local service rather than a trunk carrier. For Bonanza these points represent important traffic centers whose development warrant its best efforts whereas to Western the record indicates they were and are secondary points to which adequate service will be rendered only where some other purpose of the carrier is being served. In this connection, it bears noting that service to these points was only increased from a three times weekly frequency to twice daily after Western was placed on notice that the Board might suspend its authorization to serve the points, and thus adversely affect Western's plan for extension of its route to Phoenix.

The low priority which Western has undoubtedly given to the air transportation needs of these cities does not stem from any inherent hostility to these communities on the part of the carrier but from the fundamental economic fact that a business will ordinarily first seek to exploit the areas of greatest potential profit, leaving the others to some later period of greater relative prosperity. For similar reasons, in times of economic stress or operational difficulty, the least profitable points are apt to be the first to which service is curtailed. These are factors which support our conclusion that the transportation needs of El Centro and Yuma will, in the long run, be better served by a local service carrier than by a trunk.

It should be further noted that service to Los Angeles, the city with which Yuma and El Centro have their greatest community of interest, over the new routing by Bonanza will be no less convenient than that currently offered by Western. For example, Western operates only one through flight a day in each direction between Los Angeles on the one hand and El Centro and Yuma on the other, the other flight requires a change of plane at San Diego.<sup>17</sup> Bonanza's proposed schedules provide an equally convenient and no less expeditious trip for eastbound or westbound passengers, and all flights are through flights which do not require a change of plane. Moreover, since Bonanza will not have to schedule its equipment with a view to its availability for longer more profitable hauls, it will have sufficient flexibility to permit the scheduling of service which will permit passengers from communities east of San Diego such as Yuma and El Centro to travel to San Diego and Los Angeles, transact their business and return home the same day. It is this type of scheduling which we have pointed out provides the most desirable service for communities on local air service routes.<sup>18</sup>

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<sup>17</sup>According to the Official Traffic Guide for January 1952, Western has two scheduled departures from Los Angeles to San Diego, El Centro and Yuma. The first, a DC-3 flight, leaves Los Angeles at 7:20 a.m. PST and arrives at Yuma at 10:50 a.m. MST, the second a Convair flight as far as San Diego leaves Los Angeles at 1:25 p.m. PST, arrives at San Diego 2:10 leaves San Diego as a DC-3 flight 10 minutes later arriving at Yuma at 4:45 p.m. MST. The earliest flight to Los Angeles leaves Yuma as a DC-3 flight at 11:10 a.m. MST, changes to Convair equipment at San Diego and arrives at Los Angeles at 12:40 p.m. PST.; the later flight leaves Yuma at 7:25 p.m. MST and arrives at Los Angeles at 8:55 p.m. PST.

<sup>18</sup>Western's schedules (see footnote 17, *supra*) permit a Los Angeles resident to travel to Yuma and El Centro, transact business and return the same day but do not permit the El Centro and Yuma passenger the same convenience.

We have decided that the suspension of Western's authority to serve El Centro and Yuma should terminate with the expiration of the local service segment awarded herein to Bonanza, *i. e.*, on December 31, 1952, when Bonanza's certificate formally expires. However, it is possible that Bonanza's authorization may be temporarily extended by virtue of Section 9(b) of the Administrative Procedure Act<sup>19</sup> and the filing of a timely application by Bonanza for renewal of its authority. If Bonanza's authority were thus extended it would be appropriate to continue the suspension of Western's authority until disposition of Bonanza's application. Otherwise there would result a needless duplication of service at El Centro and Yuma. Accordingly, Western's authority to serve El Centro and Yuma will be suspended up to and including December 31, 1952, or until final determination by the Board of a timely application by Bonanza for renewal of Segment No. 2 of its route No. 105, whichever shall last occur.

We have also considered the question of necessary restrictions on Bonanza's authority to operate the new route segment to prevent the carrier, insofar as practicable, from offering additional through service between Los Angeles-Long Beach on the one hand, and San Diego and Phoenix on the other, or between San Diego and Phoenix. At present, Bonanza has the usual local service restriction in its certificate which requires it to render service to each point between point of origin and point of

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<sup>19</sup>Section 9(b) of the Administrative Procedure Act provides, in part, as follows: "\* \* \* In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

termination of each flight. It will, therefore, be sufficient for this purpose if we require that trips scheduled between Los Angeles-Long Beach on the one hand and San Diego on the other shall be scheduled to originate or terminate at Phoenix.<sup>20</sup>

#### CONCLUSION.

On the basis of the foregoing considerations and all the facts of record, we find that the public convenience and necessity require:

1. The amendment of Bonanza's certificate for route No. 105 to include a new segment extending between the coterminal points Los Angeles and Long Beach, Calif., and the terminal point Phoenix, Ariz., via the intermediate points Santa Ana-Laguna Beach, Oceanside, San Diego, and El Centro, Calif., and Yuma and Ajo, Ariz., and Blythe, Calif.

2. That each trip scheduled by Bonanza between the coterminal points Los Angeles and Long Beach and the intermediate point San Diego shall originate or terminate at Phoenix, Ariz.

3. That Bonanza shall not serve Ajo, Ariz., and Blythe, Calif., on the same flight.

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<sup>20</sup>In Order Serial No. E-3597, dated November 22, 1949, the Board permitted Bonanza to overfly points on its then existing route. That order is so drawn as to apply only to the route between the terminals Reno, Nev., and Phoenix, Ariz., and would not apply to the new route segment herein awarded to Bonanza.

4. Suspension of Western's certificate for route No. 13 with respect to El Centro, Calif., and Yuma, Ariz., until December 31, 1952, or until the date on which the Board shall have finally determined a timely filed application by Bonanza for renewal of Segment No. 2 of route No. 105, whichever shall last occur.<sup>21</sup>

5. Suspension of Frontier's certificate for route No. 93 with respect to service over segment "1" between the terminal points Yuma and Phoenix, Ariz., via Ajo, Ariz.

We also find that Bonanza is a citizen of the United States within the meaning of the Act, and is fit, willing, and able properly to perform the air transportation authorized herein and to conform to the provisions of the Act, and the rules, regulations, and requirements of the Board thereunder.

In addition, we find that the public convenience and necessity do not require suspension of Western's certificate for route No. 13 insofar as service to San Bernardino and Palm Springs are concerned.

We also find that the applications in this proceeding should be denied in all other respects.

An appropriate order will be entered.

Nyrop, Chairman, Ryan, Lee, Adams, and Gurney, Members of the Board, concurred in the above opinion.

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<sup>21</sup>We will allow the carrier thirty days after the effective date of its amended certificate to wind up its business at El Centro and Yuma.

## Appendix.

Excerpts from the Report of Examiner F. Merritt Ruhlen, Served August 17, 1951, in the Reopened Additional California-Nevada Service Case, Docket No. 2019, *et al.*

This proceeding was instituted to permit a re-examination of the local air service needs of the Los Angeles-San Diego-Phoenix area and a determination of the route pattern best adapted to meet those needs. In order that the Board would have the widest latitude in establishing a local route pattern, it ordered Western and Frontier to show cause why their authorizations to serve the smaller communities in this area should not be suspended<sup>1a</sup> proposals for local service.

Southwest proposes a route between Los Angeles and Phoenix via Santa Ana-Laguna Beach, Oceanside, San Diego, El Centro, Yuma, and Ajo. It also proposes a route between Los Angeles and Phoenix via Ontario-Pomona, Riverside-San Bernardino, Banning-Beaumont, Palm Springs, Indio, and Blythe with a segment between Indio and El Centro connecting its two proposed Los Angeles-Phoenix routes. Bonanza's route proposals are similar to those of Southwest except that it does not contemplate service to Indio, Banning-Beaumont, or Ontario-Pomona. Western seeks an extension of its present San Diego-Yuma segment to Phoenix. Each of the applicants indicated its willingness to accept certificates and consolidated such suspension proceedings with the for any local service required in the Los Angeles-Phoenix area.

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<sup>1a</sup>The suspension issues involve Western's authorizations to serve San Bernardino, Palm Springs, El Centro, and Yuma and Frontier's authorization of a Yuma-Ajo-Phoenix segment.

Pursuant to notice a public hearing was held in Washington, D. C. and Los Angeles, California. Briefs have been submitted by all of the applicants, Public Counsel, and the intervenor, American Airlines; the intervenors Los Angeles Airways and TWA submitted letters stating their position.

The problem of establishing air service in this area adequate to meet both long haul and local service needs has been the subject of Board proceedings for a number of years. To facilitate an understanding of the problems involved herein it is worthwhile to consider the historical background of the local service problem in this area.

In 1940 Western applied for a route between Los Angeles-San Diego and Phoenix. The Los Angeles-Palm Springs-El Centro portion of that application<sup>2</sup> was consolidated into the North-South California Case, 4 C. A. B. 254 (1943) and the San Diego-El Centro-Yuma Phoenix proposal<sup>3</sup> in to the East-West California Case, 4 C. A. B. 297 (1943). In addition, Western's request for authority to serve San Bernardino as an intermediate point on its route No. 13<sup>4</sup> was also consolidated into the North-South California Case, *supra*. These two proceedings were decided on May 10, 1943, and Western was certificated to serve San Bernardino, Palm Springs and El Centro as intermediate points on its Los Angeles-San Diego route No. 13, but its proposal for service to Yuma and Phoenix was denied. In 1942 Western applied for a route from El Centro to Douglas via Yuma.

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<sup>2</sup>Docket No. 414.

<sup>3</sup>Docket No. 563.

<sup>4</sup>Docket No. 532.

Phoenix, Tucson, and Nogales.<sup>5</sup> This application was considered in the Rocky Mountain Case, 6 C. A. B. 695 (1946). In that decision the Board authorized the inclusion of Yuma as an intermediate point on route No. 13 between El Centro and Palm Springs, but denied Western's application for an extension to Phoenix and beyond.

In the West Coast Case, 6 C. A. B. 961 (1946) Southwest, Western, and other applicants proposed additional service in the area south and southeast of Los Angeles.<sup>6</sup> All these applications were denied. In February 1946, Western filed another application proposing service from Yuma to Phoenix and points beyond.<sup>7</sup> This application was included in the Arizona-New Mexico Case, 9 C. A. B. 85 (1948), which embraced other proposals for service in the area between Phoenix and San Diego. Western's application was again denied and Arizona Airways was authorized to operate local air service in Arizona, which included a route segment between Phoenix and Yuma via Ajo. In 1947 the Board in the Los Angeles Helicopter Case, 8 C. A. B. 92 (1947) authorized Los Angeles Airways to provide a helicopter mail and express service in the Los Angeles metropolitan area which included any point within a radius of 50 miles from the Post Office Terminal Annex Building, Los Angeles, California.

In the original Additional California-Nevada Service Case, 10 C. A. B. 405 (1949) Southwest proposed local

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<sup>5</sup>Docket No. 819.

<sup>6</sup>Southwest, Docket No. 722; Western, Docket No. 821; American, Docket No. 1395; Los Angeles Airways, Docket No. 1408; Ryan School of Aeronautics, Docket No. 1364; and TWA, Docket No. 1037.

<sup>7</sup>Docket No. 2224.

service in the Los Angeles-San Diego-Phoenix area. Before that case was decided Western entered into an agreement with Arizona Airways to transfer its San Diego-El Centro-Yuma segment to Arizona Airways, Docket No. 3440. In the Additional California-Nevada Service Case, *supra*, the Board deferred decision on Southwest's proposal for local service in this area pending consideration of the transfer of Western's San Diego-Yuma route to Arizona Airways. In the meantime Western filed an application, Docket No. 3768, requesting permission to suspend service on the San Diego-El Centro segment pending inauguration of service by Arizona Airways from Yuma to Phoenix; thereafter Western withdrew its application for permission to suspend service of the San Diego-Yuma segment and for the approval of the transfer of this segment to Arizona Airways, and in Docket No. 3976 applied for the extension of route No. 13 from Yuma to Phoenix. In addition Western filed an application, Docket No. 4007, for expeditious consideration of its Yuma-Phoenix application and for an exemption order authorizing Western to immediately inaugurate Yuma-Phoenix service. This application was denied by the Board by Orders Serial Nos. E-3727, Dec. 19, 1949 and E-3869, February 2, 1950.

In the meantime the Board in a Supplemental Opinion in the Additional California-Nevada Service Case on December 19, 1949 authorized the extension of Southwest from Los Angeles to Phoenix via Santa Ana-Laguna Beach, Oceanside, San Diego, El Centro, Yuma, and Ajo; ordered Western to show cause why its service at San Bernardino, Palm Springs, El Centro, and Yuma should not be suspended; and ordered Arizona Airways which had been merged with Frontier Airlines to show cause why its Yuma-Phoenix segment should not be suspended.

In the Monarch-Arizona Merger Case, Docket No. 3977, decided April 10, 1950, the Board approved the merger of Arizona Airways and Frontier subject to the condition that service should not be inaugurated on the Yuma-Phoenix segment pending determination of the suspension proceeding referred to above. On March 10, 1950 and May 12, 1950 the Board by Orders Serial Nos. E-3975 and E-4156 rescinded Southwest's authorization for a Los Angeles-Phoenix route and consolidated its application with the Western and Frontier (Arizona Airways) suspension proceedings and the applications of Western and Bonanza for Los Angeles-San Diego-Phoenix routes.

An examination of the above facts discloses that the Board has had the Phoenix-San Diego-Los Angeles area under almost constant surveillance for the last ten years and has as yet been unable to find a satisfactory method for meeting the local air transportation needs of this area.

#### LOS ANGELES-SAN DIEGO.

Southwest and Bonanza propose local service to Santa Ana-Laguna Beach and Oceanside as intermediate points between Los Angeles and San Diego on their proposed Los Angeles-San Diego-Phoenix routes.<sup>8</sup>

*Santa Ana-Laguna Beach:* Santa Ana and Laguna Beach are located 19 miles south of the Long Beach Airport, and had a 1950 population of 51,722; this represented a 42.1 percent increase over 1940. These two cities

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<sup>8</sup>At the hearing Bonanza confined itself to an attempt to prove the need for an extension from Phoenix to San Diego, and stated that it did not believe that additional service between San Diego and Los Angeles was justified. However, it stated that in event the Board found that such service was required it would be willing to provide it.

are located in the Los Angeles metropolitan area and have air mail service from Los Angeles Airways helicopter operation. The following table sets forth the number of rail and bus schedules daily between Santa Ana-Laguna Beach and Long Beach, Los Angeles, and San Diego.

	<u>Santa Ana</u>		<u>Frequencies</u>		<u>Average Time</u>	
	Bus	Rail	Bus	Rail	Bus	Rail
Los Angeles	46	50	1:57	1:22		
San Diego	6	10	2:30	2:09		
Long Beach	14		:52			
	<u>Laguna Beach</u>					
Los Angeles <sup>1</sup>	56		1:56			
San Diego	56		2:04			
Long Beach	56		.49			

<sup>1</sup>Laguna Beach receives rail service through Santa Ana.

The principal community of interest of these cities as indicated by hotel registration submitted by Southwest<sup>9</sup> is with Los Angeles where air service to all parts of the country is available. Santa Ana has a secondary community of interest with San Diego.

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<sup>9</sup>The hotel registration data submitted by Southwest in its exhibit SX 6 represented a 30-day period for each of the cities to which service herein is proposed. This exhibit was based on registration cards obtained from hotels and motels in each city for a period varying from 2 weeks to 1 month. The material thus obtained was expanded to cover all hotel rooms in each city for a 30-day period. Due to possibilities of error resulting from the limited periods and limited number of hotels covered, little reliance can be given to this data in determining the volume of traffic to be expected to flow to and from these cities. However, in spite of such defects these data would seem substantially more reliable in disclosing community of interest than would unsupported statements of witnesses. Consequently, in the absence of actual traffic data, these hotel registrations appear generally to be the best community of interest evidence available.

*Oceanside:* Oceanside, with a 1950 population of 12,880, is located approximately 60 miles from the Long Beach airport, and 40 miles from San Diego. Excellent highway facilities are available to both of these points, although traffic congestion tends to slow up travel by this means. Oceanside has 5 rail round trips daily with an average time of 2 hours to Los Angeles and 1 hour 6 minutes to San Diego. It has 69 bus schedules daily, which require an average of 2 hours 52 minutes to Los Angeles and 1 hour 4 minutes to San Diego, \* \* \* Oceanside's principal community of interest as indicated by hotel registrations is with Los Angeles and only a minor community of interest is indicated with San Diego and points to the east of San Diego on the San Diego-Phoenix route.

\* \* \* \* \*

*Los Angeles-San Diego Local Traffic:* United, Western, and American now provide air service between San Diego and Los Angeles-Long Beach; United and Western are on an unrestricted basis. In January 1951 these 3 carriers using DC-3, DC-6, and Convair equipment operated 32 schedules with a total of 1,110 seats daily between Los Angeles and San Diego. and Western and United operated 12 schedules with 366 seats daily between Long Beach and San Diego. United's load factors between these points were 65.4 percent in May 1950 and 71.7 percent in October of the same year. During the year ended April 30, 1950 American operated from San Diego to Los Angeles with a local load factor of 14.7 percent; on flights from Los Angeles to San Diego the local load factor was 18 percent. During March and September, 1949, Western operated the San Diego-Los Angeles segment with an average load factor of less than 50 percent.

In addition to the certificated service, two intrastate air carriers, California Central and Pacific Southwest, each operate 4 round trips daily between San Diego and Los Angeles at reduced fares. During the year ended April 30, 1950 California Central experienced an average load factor of 31.1 percent over this segment. \* \* \*

#### SAN DIEGO-PHOENIX.

All of the applicants herein propose local service between San Diego and Phoenix. Southwest and Bonanza propose service to the intermediate points El Centro, Yuma, and Ajo; and Western proposes the extension of its San Diego-El Centro-Yuma route segment to Phoenix. Frontier is authorized to operate the Yuma-Ajo-Phoenix segment but service has never been inaugurated, and, as mentioned previously, this authorization has been suspended pending decision here.<sup>10</sup>

*El Centro:* El Centro, with a population of 12,481, is located 89 miles from San Diego and 220 miles from Phoenix. It is a small trade area center for the fertile Imperial Valley which produces substantial quantities of agricultural products.

Since February 1950 Western has provided El Centro with two round trips daily. During the period February through September 1950 El Centro generated 3,448 passengers or an average of 431 monthly. On the basis of two round trips daily this was equivalent to 3.6 passengers per schedule. 1,669 or 48 percent of these passengers traveled to and from Los Angeles-Long Beach, 873 or 25 percent traveled to or from San Diego, and

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<sup>10</sup>Monarch-Arizona Merger Case, decided 4/10/50, Order Serial No. E-4050.

336 or 10 percent traveled to or from San Francisco. No other city generated 2 percent of the total El Centro traffic.

To the east the potential traffic flow is more difficult to estimate as no direct air service has been available. Hotel registrations at El Centro and at Brawley and Calexico, two other Imperial Valley cities, indicate that the principal community of interest of the Imperial Valley is with Los Angeles-Long Beach and San Diego, and that the community of interest with Phoenix is relatively minor. Out of a total of 17,225 registrants at El Centro, Brawley, and Calexico 7,143 were from Los Angeles-Long Beach, 2,134 from San Diego, and 606 from San Francisco, and only 269 from Phoenix. However, there were 2,136 registrants from points in the East who would receive a more direct service through Phoenix.

Although there is testimony of record that a substantial community of interest exists between El Centro and Phoenix due to Phoenix' status as a winter resort and the common ownership and operation of farms by Phoenix residents, the hotel registrations above mentioned indicate that such community of interest as does exist is relatively minor compared with El Centro's community of interest with San Diego and Los Angeles. El Centro has direct rail transportation to Phoenix, San Diego and Los Angeles but the traveling time due to the distance involved is substantially greater by rail than by air. Furthermore, the intense heat during the summer months, which makes the highways practically untravelable except at night, increases the need for air transportation.

El Centro's generation of traffic during the eight months in 1950 previously mentioned demonstrates that this city

will develop a substantial amount of air traffic which will be increased if an outlet to the east at Phoenix is authorized.

*Yuma:* Yuma, with a 1950 population of 9,095, is located 63 miles east of El Centro and 157 west of Phoenix. This city is also the center of a fertile agricultural area which is being rapidly extended by the expansion of irrigation facilities.

Western commenced serving Yuma on two round trips daily in February 1950. During the first eight months of this service Yuma generated a total of 1,471 passengers. Of these 715 or 49 percent were to or from Los Angeles-Long Beach, 497 or 34 percent were to or from San Diego, and 99 or 7 percent were to or from San Francisco. The above figures show that Yuma generated approximately 6 passengers per day with air service in only one direction.

Yuma's traffic potentiality to the east is difficult to determine due to the fact that no certificated air service has ever been provided in that direction. However, the fact that Yuma is located in Arizona and Phoenix is the State capital and principal trade center would tend to encourage travel between these cities. That these cities have a strong relationship is supported by hotel registration data of record. Out of a total of 15,477 registrants at Yuma, 3,706 were from Los Angeles-Long Beach, 2,047 from Phoenix, and 1,621 from San Diego. In addition 3,927 were from points east of Phoenix who would be benefited by connecting service at that city. On the basis of the above data it would appear that Yuma would generate a substantial amount of traffic to and from Phoenix and points east.

Although Yuma has direct rail service to Phoenix, San Diego and Los Angeles the distance involved results in a substantial amount of time required for travel to or from either of these points. Like El Centro the intense summer heat makes highway travel difficult. Western's experience during the eight months in 1950 above cited, Yuma's isolation, and the strong community of interest with Phoenix and points east indicate that a substantial amount of traffic would be generated if Yuma were served on a Phoenix-San Diego-Los Angeles route.

*Ajo:* Ajo is a mining city with a population of approximately 6,000, located 103 air miles from Yuma and 86 miles from Phoenix. The principal industry of this city is the operation of a copper mine by Phelps Dodge Corporation. This mine produces 475 tons of ore daily. Recently a new mill with a daily capacity of 2,500 tons has been constructed, and a new smelter for the ores mined locally has been installed. Formerly the ore from Ajo was transported to the smelter at Douglas.

Ajo is extremely isolated. It has no passenger rail service, the public transportation consisting of bus service to Phoenix over a second class road. The highways are indirect and during the summer the temperatures go as high as 130 degrees, making auto travel uncomfortable and inconvenient.

Inasmuch as Arizona Airways never inaugurated its certificated service it is difficult to estimate the air traffic potentiality of this city. Arizona Airways did operate one round trip a day as a noncertificated carrier in 1946, during which period it averaged one passenger daily. But due to a lapse of time and the type of service provided the volume of traffic actually carried in 1946 has

but very little probative value with reference to the traffic Ajo might produce if it were given two round trips a day on a certificated interstate carrier operating between Phoenix and San Diego.

Ajo's principal community of interest is indicated by hotel registrations submitted by Southwest. Out of a total of 666 registrants at Ajo, 286 were from Phoenix, 66 from Los Angeles-Long Beach, 22 from San Francisco, and 20 from San Diego. In addition 184 were from cities to the east of Phoenix. Testimony of a representative of the Arizona Corporation Commission also indicated that Ajo's principal community of interest is with Phoenix.

Southwest estimates that Ajo would generate approximately 400 passengers monthly. Because of its extreme isolation Ajo would no doubt produce a substantial amount of air traffic despite the limited potential indicated by the hotel registration data, but it may not be as strong a traffic producer as Southwest estimates. However, it would appear that it is stronger at the present time than when service to Ajo was certificated by the Board in 1948 and that service on a direct San Diego-Phoenix route would generate more traffic and could be provided at a lower unit cost than the Arizona Airways operation authorized which deadended at Yuma.

*San Diego-Phoenix:* American provides nonstop service between San Diego and Phoenix. During March 1951 that carrier operated 4 San Diego-Phoenix round trips daily providing morning and afternoon schedules in each direction. American submitted data for the year May 1, 1949 through April 30, 1950 showing the average local traffic load factor for representative months, weeks, days.

and hours. There were some isolated incidents when the local load factors exceeded 80 percent, but during this period there was an average of 26.5 seats per flight available for local passengers on eastbound flights and 32.2 westbound and local load factors averaged 23.4 and 26.2 percent, respectively. \* \* \*

*Conclusions:*

\* \* \* \* \*

Air service to El Centro, Yuma and Ajo on a San Diego-Phoenix route would provide a substantial benefit to the traveling public. El Centro's primary needs for air service is to Los Angeles, San Diego, and San Francisco and it has a secondary need for air service to Phoenix and points east. Yuma's primary need for air service is to Los Angeles, San Diego and Phoenix. The primary need of Ajo is for direct air service to Phoenix and it has a secondary need for air service to San Diego and Los Angeles. The three applicants submitted traffic estimates over the proposed route and American contended that such estimates were excessive.

A summary of the applicant's passenger estimates on a monthly basis follows:

	<u>El Centro</u>	<u>Yuma</u>	<u>Ajo</u>	<u>Total</u>
Western <sup>1</sup>	663	998		1,661
Southwest <sup>2</sup>	992	474	414	1,880
Bonanza	960	1,080	240	3,280

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<sup>1</sup>No service to Ajo proposed. Estimated traffic to San Bernardino and Palm Springs eliminated.

<sup>2</sup>Southwest in its revenue and expense estimates based on revenue miles to be flown and assumed load factor estimated a passenger potential approximately 50 percent of that indicated here.

Western's estimates of El Centro and Yuma traffic to the west were based on its actual operating experience during March and February 1950 expanded to a yearly basis using its actual 1949 seasonal variations index. Estimates of traffic from these cities to Phoenix were judgment figures. Southwest's estimates were based on a comparison of the proposed cities with cities on its existing system in the same population groups. Bonanza's estimates were based on a comparison with its actual operating results at Prescott and Kingman.

In addition to the traffic to be generated at the intermediate points Western forecast 198 monthly passengers between Phoenix and Los Angeles and 57 between Phoenix and San Diego. Southwest and Bonanza made no direct estimates of Phoenix passengers to and from San Diego and Los Angeles but Southwest did estimate San Diego would generate 906 monthly passengers. No attempt was made to indicate the direction these passengers would travel.

Southwest's and Western's estimates were based on operations between El Centro and Los Angeles via Palm Springs and San Bernardino as well as via San Diego. Consequently, the estimates should be modified to a minor extent for the service herein found needed.

American submitted no estimate of the total traffic which would be generated but contended that Western's and Southwest's estimates were excessive. With reference to Yuma-Phoenix, American stated 1,000 annual passengers were the maximum as contrasted with Western's estimate of 9,855.

Inasmuch as El Centro and Yuma have received convenient air service only since February 1950, no air service

from El Centro and Yuma to the east has been provided, and Ajo has never received certificated air service, any estimate of the potential traffic which will be generated over this segment is of necessity somewhat speculative. However, after a study of the estimates of the various parties, Western's experience during 1950, and community of interest date it is possible to come to some rather specific conclusions as to the potential traffic over this route segment.

During the 8-month period, February through September 1950, Western generated an average of 431 passengers per month at El Centro of which substantially all were destined or originated at points west of El Centro. Inasmuch as this was the first time since January 1947 that El Centro had received two round trips daily<sup>11</sup> it can be assumed that additional traffic will be generated if convenient schedules are maintained and more of the traveling public learns to rely on its frequency and reliability.<sup>12</sup> Consequently, El Centro should generate an average of approximately 600 passengers per month to and from San Diego, Los Angeles, and points to the west with two round trips daily. El Centro's Community of interest with Phoenix is not strong but a substantial traffic flow to points east of Phoenix is indicated by hotel registration data previously cited. An outlet to the east through Phoenix would be substantially more convenient for persons traveling between El Centro and points east of Phoenix than would a backhaul to San Diego or Los

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<sup>11</sup>One round trip daily was provided during February and March 1947 and three round trips weekly from April 1947 through January 1950.

<sup>12</sup>During September 1946 the ninth month after El Centro service was inaugurated, El Centro generated 591 passengers on two round trips daily.

Angeles for connections with transcontinental carriers. Consequently, two round trips daily should generate an average of 150 passengers per month between El Centro and Phoenix and points to the east.

Yuma generated an average of 184 monthly passengers with service in only one direction during the above mentioned eight months in 1950. For reasons similar to those cited with reference to El Centro, Yuma traffic to the west should increase to at least 250 passengers monthly. In addition, Yuma has a community of interest with Phoenix and points to the east to which no satisfactory service is available comparable to that with San Diego, Los Angeles, and points to the west, and 250 passengers monthly should be generated between Yuma and Phoenix and points east.

Ajo, extremely isolated with no air service and poor bus and highway transportation, has its strongest community of interest with Phoenix. This city should generate an average of 200 passengers per month to Phoenix and 100 passengers per month to points to the west such as San Diego, Los Angeles, and San Francisco.

American compared the Yuma-Phoenix local traffic with the San Diego-Phoenix local traffic, which it estimated at 6,150 annually,<sup>13</sup> and concluded that an exceedingly liberal estimate of the Yuma-Phoenix local traffic would be 1,000 passengers yearly in both directions. American, however, ignored the air traffic from San Diego to points east of Phoenix. An examination of the Board's September 1948 and March 1949 survey figures discloses that the traffic from San Diego to points east

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<sup>13</sup>The record does not disclose how this figure was determined but it approximates the September 1948 and March 1949 survey figures multiplied by 6.

of Phoenix, south of Missouri or east of the Mississippi which generated 10 or more passengers in either of the survey months was more than  $4\frac{1}{2}$  times as great as the local San Diego-Phoenix passengers estimated by American. On the same basis there would be 4,500 passengers from Yuma to points east of Phoenix who would benefit in a savings of both time and money if a route to Phoenix was established, making a total of 5,500 annually who would use this service. This would be equivalent to 458 monthly passengers traveling between Yuma and Phoenix as compared with the above estimate of 250 monthly passengers. The Yuma-Chicago trip via Phoenix would be more than an hour faster and would cost \$20 less than the Yuma-Chicago trip via San Diego. The savings in time and fares would be even greater to many points south of Chicago. Accordingly, it is concluded that practically none of the traffic between Yuma and points east of Phoenix would use the San Diego or Los Angeles gateways.

American also compares the traffic generating ability of Yuma with that of Douglas-Bixby to determine the Yuma-Phoenix traffic potential and points out that there was an average of 67 monthly Phoenix-Douglas local passengers during the two survey months above mentioned.<sup>14</sup> However, American provided Douglas with only one round trip daily with arrivals and departures during the midday. With schedules as inconvenient as this American after several years serving Douglas in both directions generated an average of 221 passengers monthly in September 1948 and March 1949 as compared with Yuma's average of 184 monthly passengers in only one

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<sup>14</sup>American discounts the survey figures 10 percent for refunds.

direction during the first 9 months it received more than three round-trip schedules weekly.

Southwest's hotel registration data disclose 5,954 hotel registrations at Yuma from Phoenix and points east as compared with 8,487 registrations from San Diego, Los Angeles, points to the west, and Los Angeles-Gateway cities.<sup>15</sup> Consequently, it is concluded that the volume of air traffic which Yuma would generate to the east would be comparable with that which it will generate to the west and that the traffic carried between Yuma and Phoenix and points beyond would be at least 3,000 per year as above estimated rather than the 1,000 estimated by American.

Although no additional service is needed for the local San Diego-Phoenix and Los Angeles passengers there is no doubt that some passengers would use a local service carrier if no trunkline service were available at the time the transportation was desired. This traffic should amount to 120 passengers per month both ways.

On the basis of the above estimates 36 passengers per day would be generated over the San Diego-El Centro segment, 21 passengers per day over the El Centro-Yuma segment, 21 passengers per day over the Yuma-Ajo segment, and 24 passengers per day over the Ajo-Phoenix segment. This would be equivalent to load factors of 43 percent, 25 percent, 25 percent, 29 percent, respectively, over the above mentioned segment on two round trips daily with 21 passenger equipment. This volume of traffic would generate 3,204 revenue passenger miles per day over the 89 mile San Diego-El Centro segment.

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<sup>15</sup>Los Angeles gateway cities include an undetermined amount of passengers from some eastern points who would receive more convenient Yuma service through Phoenix.

1,323 over the 63 mile El Centro-Yuma segment, 2,163 over the 103 mile Yuma-Ajo segment, and 1,992 over the 83 mile Ajo-Phoenix segment or 8,682 revenue passenger miles per day. At a net return of 6 cents per passenger mile<sup>16</sup> this would be equivalent to passenger revenues of \$520.92 daily, or 38.5 cents per plane mile. Freight, express, and excess baggage should produce some additional revenues. Upon the basis of Western's 1949 experience this should be about 4 percent of passenger revenues, or 1.5 cents per mile. Added to passenger revenues, this would make total non-mail revenues of 40 cents per revenue mile.

As hereinafter pointed out on fully allocated basis Western should be able to provide this service at less than 60 cents per revenue plane mile. This would leave 20 cents per revenue mile plus profit to be paid by the Post Office Department for mail transportation.

Assuming 2 round trips daily and an operating performance of 98 percent 483,610 revenue plane miles would be flown annually. At 20 cents per mile the break-even need would be approximately \$96,722. In addition to intrasegment revenues above estimated, additional revenues which should substantially exceed the costs involved would be generated from passengers who traveled beyond San Diego and Phoenix. If these passengers were carried by the local San Diego-Phoenix operator, the extrasegment revenues thus generated would reduce that carrier's need for mail pay. If they were transferred to another carrier, that carrier's mail pay needs would

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<sup>16</sup>Western estimates a net return of 6.2 cents per revenue passenger mile assuming competitive fares between Phoenix and Los Angeles and San Diego and fares at current level to intermediate points and one-half of tickets sold at round-trip discount.

be decreased unless it was a service rate carrier. In any event extrasegment revenues would further reduce the burden on the Federal Government. Furthermore, the service provided would have some value to the Post Office Department. It is concluded that the actual annual subsidy would be substantially less than the indicated \$96,000.

According to the latest U. S. Census both California and Arizona are two of the most rapidly growing states in the nation. This growth is expected to continue. Specifically the Imperial Valley and Yuma areas should continue to grow as more of the fertile land is brought under irrigation and the recent increase in plant facilities at Ajo should tend to increase the population of that city. With these expected increases in population and industrial activities the market for air travel would likewise increase with a corresponding decrease in subsidy mail payments. In view of the isolation of the communities involved and the increased use of air transportation which will develop in the future, it is concluded that the probability of decreasing mail needs in the future justify an experimental service for three years between San Diego and Phoenix, via El Centro, Yuma and Ajo.

*Los Angeles-Phoenix Inland Route:* Southwest proposes a route between Los Angeles and Phoenix via Ontario-Pomona, Riverside-San Bernardino, Banning-Beaumont, Palm Springs, Indio, and Blythe, and a segment between Indio and El Centro, connecting this route with the Los Angeles-San Diego-Phoenix route. Western and Bonanza have indicated that they are willing to accept such a route or any similar route which the Board finds required in this area. In addition, the Board has directed Western to show cause why its authority to serve Palm Springs and

San Bernardino should not be suspended. Consequently, the Board can, if the public convenience and necessity so requires, substitute the proposed services of Southwest or Bonanza at these points for those of Western.<sup>17</sup>

The conomic characteristics of the cities on this route are set forth in the Examiner's report in the original proceeding herein and do not need to be repeated now. Later data of record discloses that these cities have increased in population and that there has been a steady industrial and agricultural development.

Ontario and Pomona, with a combined population of 57,980, are located 45 miles from Los Angeles, San Bernardino and Riverside, 22 miles to the east, have a combined population of 109,093. San Bernardino is a certificated point on Western's route No. 13 and receives service through Ontario. Air mail service to these communities is also provided by Los Angeles Airways helicopter operations.<sup>18</sup> Good highways exist between these communities and Los Angeles but the entire area is urban in nature which results in severe traffic congestion.

Banning-Beaumont are two small cities with a combined population of 10,165, located 26 miles from San Bernardino and 22 miles from Palm Springs. Good highways are available between Palm Springs and Banning-Beaumont.

Palm Springs, population 7,428, is a popular winter resort area which has been gradually extending its season

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<sup>17</sup>The legal power of the Board to suspend any of Western services, which that carrier contests, is discussed hereinafter in this report.

<sup>18</sup>Los Angeles Airways has recently been certificated to provide passenger service with rotary wing equipment to these communities. Los Angeles Airways Certificate Renewal Case, Docket No. 3800, decided July 5, 1951.

during the last few years. Now several of the hotels and motels keep open all year.

Indio, population 5,281, is a desert community located about 20 miles east of Palm Springs. Blythe, primarily an agricultural city located on the California-Arizona border, has a population of 4,085, is 83 miles from Indio, 156 miles from Phoenix, and approximately 65 miles from Yuma.

All of the proposed cities have had substantial population increases since 1940 ranging from 39.2 percent for Riverside-San Bernardino to 130 percent for Ontario-Pomona.

The principal community of interest of the cities on this route is with Los Angeles although Blythe does have a substantial interest with Phoenix as indicated by hotel registration data. However, even with reference to Blythe the registrants from Los Angeles outnumber those from Phoenix by a ratio of 7 to 1.

During the period January through September 1950 Western provided two round trips daily to San Bernardino. One flight was with DC-3 equipment operating between San Bernardino and Los Angeles during the summer. The other flight was a Convair serving San Bernardino as an intermediate point between Los Angeles and Las Vegas. During this period San Bernardino generated 1,472 passengers, of which 483 originated at or were destined for San Francisco, 314 Los Angeles, 143 Las Vegas, 96 Salt Lake City, 46 Seattle, 35 Denver, 28 Portland and 19 Palm Springs. During this period only 21 of these passengers originated at or were destined for points to which more direct service would be available through the Phoenix gateway than through the Las Vegas gateway.

On the basis of the above data it would appear that San Bernardino has its greatest community of interest with Los Angeles and San Francisco and that it has a comparative minor interest with Phoenix. This conclusion is supported by the hotel registration data of record.

During the first nine months of 1950 Western served Palm Springs with two round trips daily during the first four months and one round trip daily the following five months. For the first nine months of 1950 Western generated 5,267 passengers at Palm Springs, of which 3,047 originated at or were destined for Los Angeles, 1,037 San Francisco, 289 Las Vegas, 199 Seattle, and 135 Portland. Only 39 of these Palm Springs passengers originated at or were destined for points to which more direct service would be available through the Phoenix gateway than through the Las Vegas gateway. Hotel registration data also indicate an insignificant community of interest between Phoenix and Palm Springs.

*Conclusion:* As indicated previously San Bernardino and Palm Springs are certificated points on Western's route No. 13. Due to the unavailability of a satisfactory airport, San Bernardino receives service through the Ontario Airport with the result that Ontario-Pomona have more convenient air transportation facilities than does San Bernardino. Banning, Beaumont, and Indio are not certificated points but each has air service available within a distance of 26 miles, 32 miles, and 18 miles, respectively, at Palm Springs. Paved highways are available and the inconvenience of surface transportation to the Palm Springs Airport is alleviated by the elimination of the necessity for three landings within a distance of 50 miles. San Bernardino has year-round service in both directions and Palm Springs has year-round service to Los Angeles

and service to the east through Las Vegas during the winter.

Considering the proximity of these communities to Los Angeles, this type of service is sufficient to satisfy their principal air transportation needs. If sufficient traffic is available to warrant a year-round Palm Springs service to the east Western can easily drop a Los Angeles-Las Vegas flight into that airport. No service to Phoenix is provided but data of record indicate no substantial need for expeditious transportation to that city.

Blythe is 107 miles from Palm Springs, 150 miles from Phoenix and approximately 75 miles from Yuma. As previously indicated a Phoenix-Los Angeles route via Palm Springs and San Bernardino would generate an insignificant amount of traffic bound for Phoenix and points east. Consequently, the route segment between Palm Springs and Phoenix would be 250 miles in length and due to Blythe's small population would generate very few passengers, with the result that any carrier operating this segment would operate with very light load factors requiring substantial subsidies from the Federal Government. Although Blythe is an isolated community with no direct passenger rail service, the potential traffic would not justify the establishment of a route segment between Palm Springs and Phoenix via Blythe.

Nor does there appear any need for air service between San Bernardino and Palm Springs on the one hand, and El Centro, Yuma and Ajo on the other. Out of 88,700 estimated monthly hotel registrants at Banning, Beaumont, Indio, Ontario, Pomona, Palm Springs, San Bernardino, Riverside, Redlands, and Colton only 657 or less than three-fourths of one percent were from Ajo. El

Centro, Brawley, Calexico, and Yuma. Out of 33,368 registrants at the latter group of cities, only 1,326 or less than 4 percent were from the former group of cities. During September 1946, the only survey month during which Western provided a direct Palm Springs-El Centro service only one local passenger was generated.

Western provides no service between these points now and as hereinbefore stated no needs exist for service between San Bernardino or Palm Springs on the one hand and the points east of San Diego on the proposed Phoenix route.

American and TWA now provide Los Angeles-Phoenix service. During June 1951, 12 westbound schedules and 10 eastbound schedules were operated daily, the majority with 4-engine equipment. During the period May 1, 1949-April 30, 1950, American's average local load factor between Phoenix and Los Angeles was less than 30 percent in each direction. During September 1949 and March 1950, TWA had average load factors between Phoenix and Los Angeles of approximately 56 percent. One flight operated with a 91 percent load factor but no other flight averaged over 76 percent. During these same months TWA carried substantially more passengers between Phoenix and the east than between Phoenix and the west, indicating a sufficiency of seats in the latter direction inasmuch as that carrier originates or terminates no flights at Phoenix.

It thus appears that with frequent high speed schedules in both directions between Los Angeles and Phoenix, no need exists for additional service to meet the needs of terminal-to-terminal passengers.

During June, 1951, Western served Palm Springs and San Bernardino in the following manner: one DC-3 round

trip was operated between Los Angeles and Palm Springs via San Bernardino, departing from Los Angeles at 1:15 P. M. and arriving at Palm Springs at 2:20 P. M.; departing from Palm Springs at 2:50 P. M. and arriving at Los Angeles at 3:50 P. M.; one round trip daily between Las Vegas and Los Angeles via San Bernardino departing from Las Vegas at 8:50 A. M. and arriving at Los Angeles at 10:55 A. M.; and departing from Los Angeles at 5:50 P. M. and arriving at Las Vegas at 7:50 P. M. During the winter Western served both San Bernardino and Palm Springs on Los Angeles-Las Vegas flights using Convair equipment.

This pattern of service would seem to meet the basic air service needs of the San Bernardino-Palm Springs area with the possible exception that Palm Springs should have one summer schedule to Las Vegas to provide direct air transportation to the East for Palm Springs, Beaumont-Banning, and Indio.

Western submitted estimates of the financial results of its San Bernardino and Palm Springs operations on both an out-of-pocket and a fully allocated cost basis.

Passenger revenues were obtained by expanding its first quarter 1950 experience to a year using the 1949 seasonal variation index.<sup>19</sup> On this basis Western estimates that it would generate 1,180 San Bernardino passengers annually from which it would obtain revenues of \$10,667. Freight and express revenues figured at 3.95 percent of passenger revenues, the 1949 experience, amounted to 421, making total non-mail revenues of \$11,088.

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<sup>19</sup>Los Angeles seasonal variation used for San Bernardino which was not served during most of 1949. Palm Springs was not served during summer 1949 so seasonal variation was estimated.

Additional costs on the out-of-pocket basis at this city were estimated at \$27,545, leaving a deficit of \$16,457. Total operating costs per mile on this basis are 73 cents. On a fully allocated basis, Western estimated total operating expenses of \$34,330 or a per mile cost of 90 cents. This would result in a deficit of \$23,241.

At Palm Springs Western estimated 9,122 annual passengers who would produce revenues of \$102,186. Mail and express revenues computed on the same basis as for San Bernardino amounted to \$4,036, making total non-mail revenues of \$106,222. On an out-of-pocket basis total operating costs were computed at \$37,762 yielding a non-mail profit of \$68,461. On a fully allocated basis, total expenses would be \$47,546 providing a profit of \$58,627. According to Western's estimate, on the out-of-pocket basis it would obtain from the combined San Bernardino-Palm Springs operation a non-mail profit of \$52,004. This would be reduced to \$35,436 on a fully allocated basis.

The above estimates show a profit for the Palm Springs operation and a loss for San Bernardino, but actually the Palm Springs costs cannot be divorced from those for San Bernardino as flying costs between Los Angeles and San Bernardino are charged to San Bernardino and would not be substantially reduced if service to that city were discontinued.

On a per plane mile basis, Western predicts out-of-pocket costs for the San Bernardino-Palm Springs operation of 65 cents. On a fully allocated basis, this would be 81 cents per mile.

As a check on Western's estimate reference can be made to Public Counsel's estimate that on a fully allocated basis, Western's operating costs for its entire proposal

would be approximately 56 cents per mile. It is concluded that Western's actual additional costs involved in serving San Bernardino and Palm Springs are no greater than its estimates made on fully allocated basis and that they are probably less.

Furthermore, inasmuch as Western's service to San Bernardino was not inaugurated until October 1949, the full traffic potential of that city had not been developed by the first quarter of 1950, the base period for Western's estimate. For example, during the 6 months, April through September, of that year Western generated 1,216 San Bernardino passengers as compared with its annual estimate of 1,180. As Western's service becomes more firmly established and better known, the traffic volume will continue to increase. For example, during the year ended March 31, 1951<sup>20</sup> Western generated 1,633 originating passengers only as contrasted with its estimated 1,180 annual originating and terminating passengers. During the first quarter of 1951 Western obtained 519 originating passengers at San Bernardino as contrasted with 156 such passengers during the first quarter of 1950 and 256 total passengers during that period. Although a comparison of Western's Form 41's with exhibits submitted in this proceeding shows some slight discrepancies in originating passengers for the second and third quarters of 1950, the substantial increase in traffic indicated by the Form 41's buttresses the belief that estimates based on first quarter 1950 traffic are substantially too low.

On the other hand, Palm Springs generated only 2,021 passengers during the summer of 1950 as contrasted with Western's estimate of 3,336. This, however, was the first

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<sup>20</sup>Form 41's submitted by Western.

summer since 1946 that Western had served this city. The increasing number of resorts in this area which are remaining open the year round will increase Palm Springs summer traffic and Western's estimates of the total annual Palm Springs traffic appears reasonable.

During the year ended March 31, 1951<sup>21</sup> Palm Springs originated 4,701 passengers as contrasted with Western's estimate of 9,122 originating and terminating passengers. During the first quarter of 1951, Palm Springs originated 2,495 passengers as contrasted with 1,629 during the same quarter of 1950. These figures indicate that although the Palm Springs summer traffic in 1950 was less than that estimated, the total traffic for the year ended March 31, 1951 approximated Western's prediction.<sup>22</sup>

It is concluded that due to the increased use of air transportation at San Bernardino, the total non-mail revenues from that city and Palm Springs will substantially exceed the \$117,311 estimate and that Western can serve these cities with a substantial profit before mail pay.

The use of the Las Vegas gateway for traffic to the East is more convenient and economical than the service via Phoenix proposed herein. Western requires only 7 additional flight miles to serve San Bernardino on flights to Las Vegas and only 49 additional flight miles to serve both San Bernardino and Palm Springs on such flights.

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<sup>21</sup>Form 41 Reports submitted by Western.

<sup>22</sup>Assuming the number of terminating passengers averaged 5 percent less than the number of originating passengers—the ratio indicated by Western's experience during the first 9 months of 1950—Western would have carried 9,167 Palm Springs passengers annually as contrasted with its estimate of 9,122.

On the other hand to provide service from these cities to the East through the Phoenix gateway would require a 259 mile extension from Palm Springs to Phoenix.<sup>23</sup>

The establishment of a local service route between San Diego and Phoenix as hereinbefore recommended would not eliminate the operational and economic difficulties inherent in providing a San Bernardino-Palm Springs service to Phoenix. Although a Los Angeles-Palm Springs flight could be extended to El Centro connecting with the San Diego-Phoenix route at this point, this would result in either (1) the heaviest scheduling over the weakest segment, *i. e.*, El Centro to Phoenix or (2) connecting service at El Centro for passengers to the east, with its attendant inconveniences.

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In view of the foregoing discussion it is concluded that the public convenience and necessity require service by Western between Palm Springs and San Bernardino on the one hand, and Los Angeles and Las Vegas on the other, and that the public convenience and necessity do not require any other or additional service to Ontario-Pomona, San Bernardino-Riverside, Banning-Beaumont, Palm Springs, Indio, \* \* \*.

Accordingly, it is recommended that the applications be denied and that Western's certificate for route No. 13 be suspended insofar as it authorizes a direct service between either San Bernardino or Palm Springs on the one hand, and El Centro or Yuma on the other.<sup>26</sup>

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<sup>23</sup>As indicated previously no need exists for Los Angeles-Phoenix through flights and any service authorized should be subject to local service restrictions inhibiting the generation of Los Angeles-Phoenix passengers.

<sup>26</sup>Western's contention that such a suspension beyond the power of the Board is hereinafter discussed.

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*Comparative Costs:* Southwest contends that it is a lower cost DC-3 operator than Western. For purposes of comparison Southwest argues that the costs of landings and take-offs and flight equipment depreciation should be eliminated from the cost figures of each carrier. The argument with reference to depreciation on DC-3's is that the amount of depreciation is primarily dependent upon the length of time in use and not to efficient management.

With reference to landing costs Southwest claims that it costs more to land and take-off at a point than to cruise over that point, that due to the short-haul nature of its route Southwest has to make more frequent landings than Western, and that, consequently if landing costs are included a comparison of direct flying costs is distorted. Southwest's landing cost estimate was based on applying the varying fuel and oil costs per hour for the different power ratings Southwest claims it uses in landing and taking off and computing the excess over normal cruising costs. Direct maintenance costs were assumed to vary in direct ratio to fuel and oil costs. Using this procedure Southwest calculated that each landing cost \$6.28 more than cruising over the same point.

Eliminating landing costs on this basis from the actual flying costs of Western and Southwest and the flight equipment depreciation costs shown in the Form 41's, Southwest claims that its direct flying costs for the year 1949 were 23.09 cents per mile, as compared with Western's 28.50 cents.

It is conceded that landing at a point involves greater per mile costs than cruising over that point. Southwest makes more landing per mile and, consequently, if costs

of landing were eliminated, Southwest's per mile costs would be reduced to a greater extent than would Western's. But the exact additional cost involved in landing and taking off with a DC-3 is difficult to determine and Southwest's estimate of \$6.28 per landing was not substantiated by the evidence. The record shows that the operating practices upon which Southwest based its estimates are not the actual operating practices of that carrier. Accordingly, it can not be determined how much Southwest's operating costs are increased due to its more frequent landings.<sup>30</sup>

Assuming, as Southwest contends, that Western's direct flying costs are 5.41 cents per mile higher than Southwest's, the total cost of each flight between San Diego and Phoenix would be approximately \$10 less than a flight by Southwest between Los Angeles and Phoenix via San Diego, or approximately \$14,600 annually.

As a rough check of the comparative costs of the applicants reference can be made to cost estimates on a fully allocated basis for the operations proposed by each carrier, prepared by Public Counsel.

Bonanza's costs for operating the Phoenix-Los Angeles segment via Ajo, Yuma, El Centro, San Diego, Ocean-side, and Santa Ana-Laguna Beach are estimated at 74.28 cents per mile based on Bonanza's experience for the 9 months ended Sept. 30, 1950.<sup>31</sup> For operating the

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<sup>30</sup>Using the cost per landing and the cruising cost per mile developed by Southwest, based on 3rd quarter, 1950 costs, Southwest's direct operating costs for that quarter would have been \$227,182 instead of the \$201,470 reported by Southwest. Using the same landing and cruising costs, Southwest's estimate of the additional costs involved in providing its proposed service would be \$450,473 instead of the \$293,862 estimated by Southwest.

Phoenix-San Diego segment, via Ajo, Yuma, and El Centro similar figures would be 66.9 cents.<sup>31</sup>

Southwest's costs for its entire proposed operation are estimated at 70.95 cents per mile.<sup>32</sup> Western's costs which included some Convair operations were estimated at 56.60 cents per mile.

These estimates were not prepared for the exact operation herein found needed and would have to be altered somewhat to represent the actual operations recommended. For example, Southwest's and Bonanza's costs for the Los Angeles-Phoenix route would be lowered by eliminating its proposed stops at Oceanside and Santa Ana-Laguna Beach. However, it seems clear that such adjustments would be insufficient to reduce the costs of either company sufficiently to counteract the shorter mileage involved if Western operated the needed service between San Diego and Phoenix.

Southwest contends that Western's costs should include the cost of operating between Los Angeles and San Diego inasmuch as Western will be forced to carry a substantial number of the passengers generated on the San Diego-Phoenix segment to Los Angeles and points north.

It is true that this factor would increase Western's costs to some extent. However, during June, 1951, Western operated 181 seats each way between San Diego and

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<sup>31</sup>Depreciation charged for one plane. Bonanza's schedules for its existing system submitted at the hearing and its schedules for June 1951 from the Official Airline Guide show that its daily schedules can be operated with two planes—allowing one additional plane for a spare three should be sufficient for its scheduled services. Bonanza's proposed schedules for its existing system would require the operation of three planes daily—allowing one additional plane for a spare, four should be sufficient for its proposed services.

<sup>32</sup>\$27,005 for overhead was eliminated from the estimate pursuant to the suggestion of the sponsoring witness.

Los Angeles. Although the present load factors are not available, Western operated over this segment in March and September, 1949, with average load factors of less than 50 percent. If the ratio of passengers from points east to San Diego to points north thereof remains the same as for the 8-month test period during 1950, then, on the basis of the traffic estimates hereinbefore set forth, approximately 14 additional passengers would travel over the San Diego-Los Angeles segment each way daily. This additional traffic could be accommodated easily without additional equipment.

It is recognized that the point at which a schedule might be added or eliminated between San Diego and Los Angeles would be affected by the number of passengers generated east of San Diego. However, this effect is too speculative and nebulous to justify including Western's Los Angeles-San Diego flight mileage in an economic comparison with the other applicants. Furthermore, the non-mail revenues hereinbefore estimated were limited to intra-segment mileage between San Diego and Phoenix, but actually Western could generate substantially greater revenues for itself by transporting passengers to other points on its system than could either Southwest or Bonanza.

Even assuming that Western's costs would be increased somewhat by additional costs between Los Angeles and San Diego, such additional expense would not appear sufficient to offset the substantially heavier cost of Southwest and Bonanza above indicated.

Giving consideration only to the actual cost of operations and through service benefits, Western's selection would be more in the public interest than that of either of the other applicants.

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But, before recommending Western it is necessary to consider its fitness, willingness, and ability to provide the proposed services. Western states that it is willing to provide any transportation required in the area in issue, but to determine its fitness, willingness and ability, previous actions must be considered as well as promises for the future. An examination of Western's previous service to El Centro and Yuma is in order.

Western was prevented by World War II from inaugurating service to El Centro until 1946; at that time Western established two round trips daily to Los Angeles and generated a substantial number of passengers.<sup>34</sup> This service was operated for only one year. Shortly thereafter service was dropped to one round trip daily and a little later to three round trips weekly. This type of service continued until January, 1950.

When Yuma was added as a certificated point Western provided that city with only three round trips weekly until January, 1950, when it inaugurated two round trips per day between San Diego and Yuma via El Centro. This type of service has been continued since that time.

The type of service Western provided El Centro and Yuma during 1947 through 1949 clearly did not meet the minimum requirements for adequate service. The Board has stated that as a general rule, two round trips daily are necessary for adequate service.<sup>35</sup> In the original California-Nevada Service Case<sup>36</sup> the Board reiterated

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<sup>34</sup>In September 1946, El Centro generated 591 passengers.

<sup>35</sup>North Central Case, 7 C. A. B. 639, 680 (1946).

<sup>36</sup>10 C. A. B. 405, 429 (1949).

this rule but stated that in certain situations one daily round trip might be sufficient. But nowhere has it been indicated that three round trips weekly is sufficient for local short-haul service. This service was so useless that the Post Office Department did not designate any schedules for mail service and the traffic receded from 591 at El Centro in September, 1946, with two round trips daily, to 327 during March, 1947, with one round trip daily, to 97 in September, 1947, with three round trips weekly. During the 1948 survey months El Centro generated an average of 109 passengers monthly and in 1949, 73. At Yuma 60 passengers were generated in September, 1947, and during the 1948 and 1949 survey periods an average 55 and 26 monthly passengers, respectively. It was only after the Board had authorized Southwest to provide local service between Los Angeles and Phoenix via San Diego, El Centro, Yuma, Ajo, and other points and had ordered Western to show cause why its authorizations to serve El Centro, Yuma, San Bernardino, and Palm Springs would not be suspended that Western became interested enough in providing El Centro and Yuma with service to install two round trips daily. This belated enthusiasm appears to have resulted from three factors, none of which involved fulfilling its duty to provide these cities with the service needed. First, Western feared competition from Southwest on its Los Angeles-San Diego segment; second, the authorization of Southwest to provide San Diego-Phoenix service rekindled Western's ambitions and hopes for a San Diego-Phoenix route; and third, Western

feared that it might be suspended at San Bernardino and Palm Springs as well as at El Centro and Yuma.<sup>37</sup> Consequently, Western decided to establish more frequent schedules to the points proposed for suspension. Although Western presented no affirmative case to show that additional San Diego-Phoenix terminal-to-terminal service was needed and consented to accept a restriction on its San Diego-Phoenix operation inhibiting effective competition for San Diego-Phoenix and Los Angeles-Phoenix traffic, Western's protestations are not convincing. Based on Western's previous record it would appear that its primary interest in this proceeding is to obtain an unrestricted San Diego-Phoenix route and to use the local service operation as a "stepping stone" or "hat in the door" method of accomplishing this result. It can easily be anticipated that in the event this aim is achieved in this proceeding Western will return to the Board in a short time with an application requesting the lifting of the local service restriction and a story that unless supported by terminal-to-terminal traffic the El Centro-Yuma-Ajo segment will never be economically justified. Based on the record to date Western appears to be a very "reluctant dragon" when it comes to service to El Centro, Yuma, and Ajo. It should be noted that Western did not propose service to Ajo in this proceeding and has shown no interest in the air service needs of that city despite the Board's authorization of Ajo service several years ago. It has expressed a willingness to serve Ajo if the Board finds that such service is required.

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<sup>37</sup>Palm Springs and San Bernardino can be served on Los Angeles-Las Vegas flights and Palm Springs is a comparatively strong traffic producer during the winter.

Western's treatment of El Centro and Yuma is understandable if not excusable. Western at all times proposed service to El Centro and Yuma on a San Diego-Phoenix route and contended that only with such an operation could satisfactory service be provided in an economical manner. The present record appears to support that contention. When Western failed to obtain that authorization it did some experimenting in attempt to find some economical way to provide adequate service to these cities and then abandoned the job as hopeless. It apparently decided to cut its operating minimum and concentrating its equipment and efforts on more lucrative markets. This practice, if followed by a business operating in a free market, would be sound operating procedure. But the recipient of a certificate of public convenience and necessity receives not only special privileges, such as a right to operate with limited competition and the right to subsidy mail payments, if needed, but also the duty to provide adequate service.

Although Western's interest in providing the local service herein required is substantially less than that of the other two applicants and its primary interest appears to be an extension to Phoenix, it is now and has for the past year and one-half provided two round trips daily to El Centro and Yuma and states a willingness to provide any service herein found needed.

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#### SUSPENSIONS.

The Board ordered Frontier to show cause why its certificate authorizing service between Phoenix and Yuma via Ajo should not be suspended. Frontier has not opposed this proposal. For reasons hereinbefore stated it appears that a local service route between San Diego and

Phoenix via El Centro, Yuma, and Ajo should be authorized and that the traffic segment between Phoenix and Yuma is too thin to justify service for two carriers. It further appears that service to Ajo and Yuma on a San Diego-Phoenix route is more in the public interest than the Phoenix-Yuma route authorized for Frontier. Accordingly, it is concluded that the public convenience and necessity require suspension of that part of Frontier's certificate for Route No. 93 which authorizes service between Yuma and Phoenix via Ajo.

It is contended, however, that such a suspension and the suspension hereinbefore recommended of Western's authority to operate between San Bernardino and Palm Springs on the one hand, and El Centro and Yuma on the other, will in fact be a revocation of a certificate and the Board is without power to take such action without complying with the revocation provisions of the Act. These contentions have previously been considered by the Board. In the Carribean Area Case,<sup>39</sup> it was contended that the Board was without power to impose restrictions on an unrestricted operation. The Board in that case did impose such restrictions. In All American Air, Suspension Case, 10 C. A. B. 24 (1949), one of the issues was whether the Board could suspend a route indefinitely upon a finding that public convenience and necessity so required. In that case the carrier involved consented to suspension under certain conditions. The Board did not comply with those conditions and suspended the route for an indefinite period and held that it had the authority under the Act to do so whether the suspen-

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<sup>39</sup>9 C. A. B. 534, 545-554 (1948).

sion was for a definite or indefinite period. Accordingly, although neither Western nor Frontier have consented to the suspension of any of their authorizations, it is concluded that the Board has the power to make such suspensions. It is recommended that the Board suspend Frontier's Yuma-Phoenix authorization pending decision on the renewal of its certificate or the expiration of the temporary authorization of Yuma-Phoenix service by Western herein recommended, whichever occurs first. Likewise Western's authorization of a Yuma-Phoenix route should terminate in the event Frontier's Yuma-Phoenix route is renewed.

#### RESCISSION.

Southwest contends that it was granted a certificate to operate between Los Angeles and Phoenix via San Diego and other intermediate points, and that such certificate has not been revoked. It argues that the Board does not have the power to rescind such a certificate without complying with the procedural requirements of section 401(h) of the Act with reference to suspension or revocation and inasmuch as the Board has not done so Southwest is still possessed of a legal certificate for this route.

This contention is unsound. The order granting the certificate provided that the Board reserved the right to extend the effective date of the certificate from time to time. These provisions were specifically inserted to take care of situations such as this where the Board might reconsider the authorization granted in the original opinion. See Kansas City-Memphis Case, Supplemental

Opinion, 9 C. A. B. 401 (1948), in which the Board stated that in the future certificates would be issued with the provision that they would not be effective until all petitions for reconsideration had been determined to prevent any question about the power of the Board to rescind such certificates on reconsideration. See also Pan American Airways, Inc., North Atlantic Route Amendment, 7 C. A. B. 849 (1947) in which the Board rescinded and modified a certificate previously issued to Pan American by mistake. Accordingly, it is recommended that Southwest's contention that the Board's order rescinding its certificate for the Los Angeles-Phoenix segment be dismissed.

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Orders

Serial Number E-6040

UNITED STATES OF AMERICA  
CIVIL AERONAUTICS BOARD  
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board  
at its office in Washington, D. C.,  
on the 17th day of January, 1952.

In the matter of the Reopened Additional California-Nevada Service Case. Docket No. 2019 *et al.*

ORDER.

A full public hearing having been held in the above-entitled proceeding and the Board upon consideration of the record having issued its opinion, containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That amended certificates of public convenience and necessity in the forms attached hereto shall be issued to Bonanza Air Lines, Inc., for Route No. 105, Western Air Lines, Inc., for Route No. 13, and Frontier Airlines, Inc., for Route No. 93;

2. That said amended certificates shall be signed on behalf of the Board by its Chairman, shall have affixed thereto the seal of the Board attested by the Secretary and, subject to the extension of their effective dates in accordance with the provisions of said amended certificates, shall be effective on March 17, 1952.

3. That, except to the extent granted herein, the applications of Western Air Lines, Inc., in Docket No. 3976, Southwest Airways Co., in Docket No. 2899, and Bonanza Air Lines, Inc., in Docket No. 4044, be and they hereby are denied.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan  
M. C. Mulligan  
Secretary.

(Seal)

UNITED STATES OF AMERICA  
CIVIL AERONAUTICS BOARD  
WASHINGTON, D. C.

Temporary Certificate of Public Convenience and  
Necessity for Local Service (as amended).

BONANZA AIR LINES, INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property, and mail, as follows:

1. Between the terminal point Reno, Nev., the intermediate points Carson City-Minden, Hawthorne and Tonopah, Nev., Death Valley, Calif., Las Vegas and Boulder City, Nev., Kingman, and Prescott, Ariz., and the terminal point Phoenix, Ariz.;

2. Between the coterminal points Los Angeles and Long Beach, Calif., the intermediate points Santa Ana-Laguna Beach, Oceanside, San Diego, and El Centro, Calif., Yuma, and Ajo, Ariz., and Blythe, Calif., and the terminal point Phoenix, Ariz.,

to be known as Route No. 105.

The service herein authorized is subject to the following terms, conditions, and limitations:

(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points.

(2) The holder may continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the effective date of this certificate, as amended. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein through any airport convenient thereto.

(3) On each trip operated by the holder over all or part of one of the two route segments in this certificate, as amended, the holder shall stop at each point named between the point of origin and point of termination of such trip on such segment, except a point or points with respect to which (1) the Board, pursuant to such procedure as the Board may from time to time prescribe, may by order relieve the holder from the requirements of such condition, (2) the holder is authorized by the Board to suspend service, or (3) the holder is unable to render service on such trip because of adverse weather conditions or other conditions which the holder could not reasonably have been expected to foresee or control.

(4) Each trip scheduled between the coterminal points Los Angeles and Long Beach, Calif., on the one hand, and the intermediate point San Diego, Calif., on the other shall originate or terminate at Phoenix, Ariz.

(5) The holder shall not serve Ajo, Ariz., and Blythe, Calif., on the same flight.

(6) The authority herein to serve Death Valley, Calif., shall be effective only between October 1 and

April 30, inclusive, of the period during which this certificate, as amended, shall be effective.

The exercise of the privileges granted by this certificate, as amended, shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate, as amended, shall be effective on March 17, 1952, and shall continue in effect up to and including December 31, 1952: *Provided, however,* That prior to the date on which the certificate, as amended, would otherwise become effective the Board, either on its own initiative or upon the filing of a petition or petitions seeking reconsideration of the Board's order of January 17, 1952 (Order Serial No. E-6040), insofar as such order authorizes the issuance of this certificate, as amended, may by order or orders extend such effective date from time to time.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate, as amended, to be executed by its Chairman, and the seal of the Board to be affixed hereto, attested by the Secretary of the Board on the 17th day of January, 1952.

/s/ Donald W. Nyrop,  
Chairman.

(Seal)

Attest:

/s/ M. C. Mulligan,  
Secretary.

UNITED STATES OF AMERICA  
CIVIL AERONAUTICS BOARD  
WASHINGTON, D. C.

Certificate of Public Convenience and Necessity  
(as amended)

WESTERN AIR LINES, INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property, and mail as follows:

Between the terminal point San Diego, Calif., the intermediate points El Centro, Calif., Yuma, Ariz., Palm Springs, San Bernardino, Long Beach, and Los Angeles, Calif., Las Vegas, Nev., St. George, Cedar City and Richfield, Utah, and the terminal point Salt Lake City, Utah,

to be known as Route No. 13.

The service herein authorized is subject to the following terms, conditions, and limitations:

(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points.

(2) The holder may continue to serve regularly any point named herein through the airport last

regularly used by the holder to serve such point prior to the effective date of this certificate, as amended; and may continue to maintain regularly scheduled nonstop service between any two points not consecutively named herein if nonstop service was regularly scheduled by the holder between such points prior to the effective date of this certificate, as amended. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein through any airport convenient thereto, and render scheduled nonstop service between any two points not consecutively named herein between which service is authorized hereby.

(3) The holder's authority to serve El Centro, Calif., and Yuma, Ariz., shall be suspended up to and including December 31, 1952, or until the date upon which the Board shall have finally determined a timely filed application by Bonanza Airlines, Inc., for renewal of Segment No. 2 of route No. 105, whichever shall last occur: *Provided*, That such suspension shall not become effective until thirty days after the effective date of this certificate, as amended.

The exercise of the privileges granted by this certificate, as amended, shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate, as amended, shall be effective on March 17, 1952: *Provided, however,* That prior to the date on which the certificate, as amended, would otherwise become effective the Board, either on its own initiative or upon the filing of a petition or petitions seeking reconsideration of the Board's order of January 17, 1952 (Order Serial No. E-6040), insofar as such order authorizes the issuance of this certificate, as amended, may by order or orders extend such effective date from time to time.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate, as amended, to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on the 17th day of January, 1952.

/s/ Donald W. Nyrop,  
Chairman.

(Seal)

Attest:

/s/ M. C. Mulligan,  
Secretary.

UNITED STATES OF AMERICA  
CIVIL AERONAUTICS BOARD  
WASHINGTON, D. C.

Temporary Certificate of Public Convenience and  
Necessity for Local Service (as amended).

FRONTIER AIRLINES, INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property, and mail, as follows:

1. Between the terminal point Phoenix, Ariz., the intermediate point Ajo, Ariz., and the terminal point Yuma, Ariz.;

2. Between the terminal point Phoenix, Ariz., the intermediate points Superior, Ariz., Globe-Miami, Ariz., Safford, Ariz., Clifton-Morenci, Ariz., Lordsburg, N. Mex., Silver City-Hurley, N. Mex., Deming, N. Mex., and Las Cruces, N. Mex., and the terminal point El Paso, Tex.;

3. Between the terminal point Phoenix, Ariz., the intermediate points Casa Grande, Ariz., Tucson, Ariz., Nogales, Ariz., Bisbee, Ariz., and Douglas Ariz., and the terminal point Lordsburg, N. Mex.;

4. Between the terminal point Phoenix, Ariz., the intermediate points Prescott, Ariz., and Flagstaff, Ariz., and the terminal point Winslow, Ariz.

to be known as Route No. 93.

The service herein authorized is subject to the following terms, conditions, and limitations:

(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points.

(2) The holder may continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the effective date of this certificate, as amended. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein through any airport convenient thereto.

(3) On each trip operated by the holder over all or part of one of the four numbered route segments in this certificate, as amended, the holder shall stop at each point named between the point of origin and point of termination of such trip on such segment, except a point or points with respect to which (i) the Board, pursuant to such procedure as the Board may from time to time prescribe, may by order relieve the holder from the requirements of such condition, (ii) the holder is authorized by the Board to suspend service, or (iii) the holder is unable to render service on such trip because of adverse weather conditions or other conditions which the holder could not reasonably have been expected to foresee or control.

(4) On each trip scheduled between Albuquerque, N. Mex., and Phoenix, Ariz., the holder shall schedule stops at a minimum of three points between said points.

(5) On each trip scheduled between Denver, Colo., and Phoenix, Ariz., the holder shall schedule stops at a minimum of six points between said points.

(6) The holder shall comply with the conditions set forth in ordering paragraphs Nos. 6, 7, 8 and 9 of Order Serial No. E-4050, dated April 10, 1950. Dockets Nos. 3977 and 4011.

(7) The holder's authority to serve segment "1" is suspended.

The exercise of the privileges granted by this certificate, as amended, shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate, as amended, shall be effective on March 17, 1952, and shall continue in effect until the holder's application for renewal thereof in Docket No. 4522 shall have been finally determined by the Board: *Provided, however,* That prior to the date on which the certificate, as amended, would otherwise become effective the Board, either on its own initiative or upon the filing of a petition or petitions seeking reconsideration of the Board's order of January 17, 1952 (Order Serial No. E-6040), insofar as such order authorizes the issuance of this certificate, as amended, may by order or orders extend such effective date from time to time.

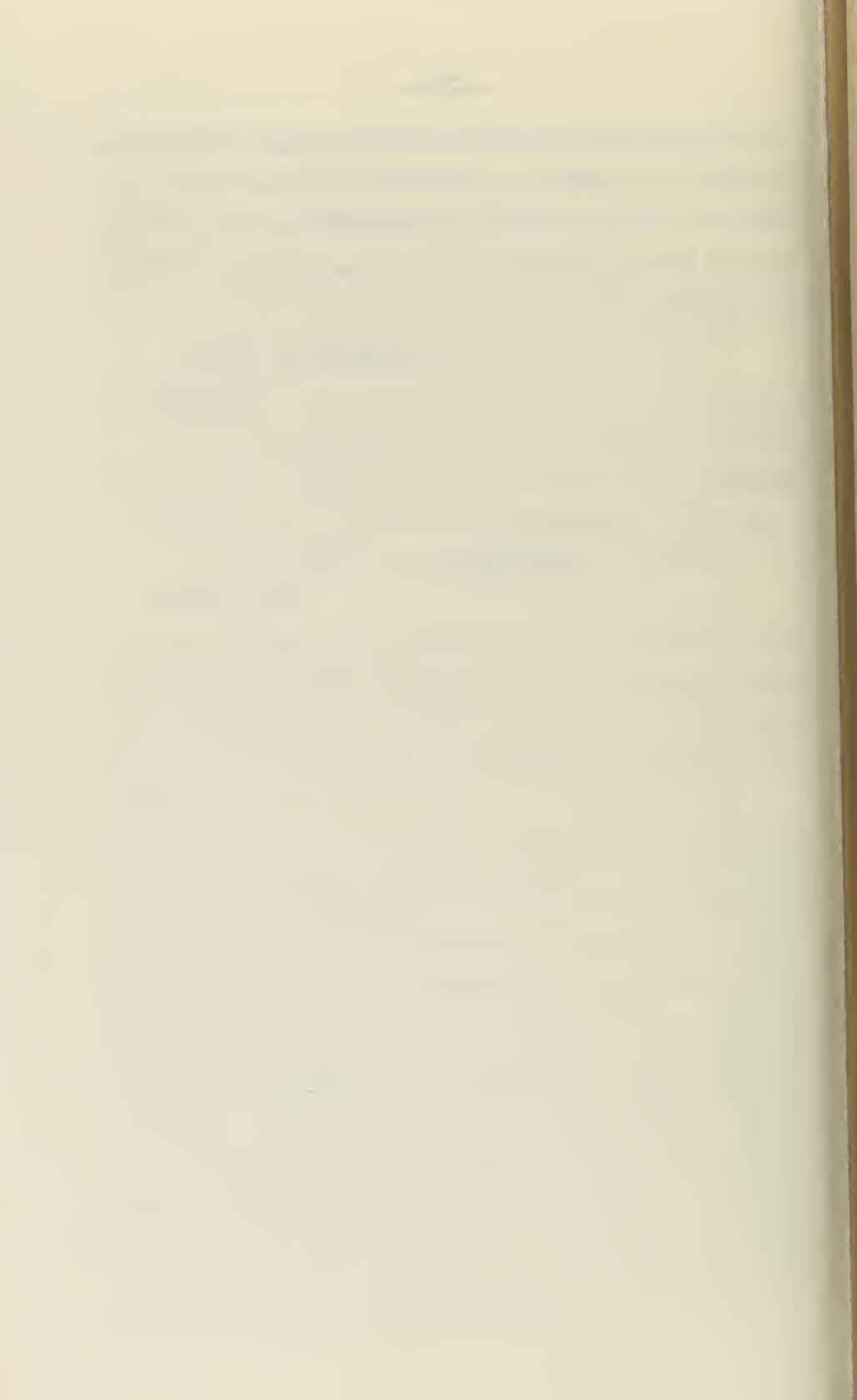
In Witness Whereof, the Civil Aeronautics Board has caused this certificate, as amended, to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on the 17th day of January, 1952.

/s/ Donald W. Nyrop,  
Chairman.

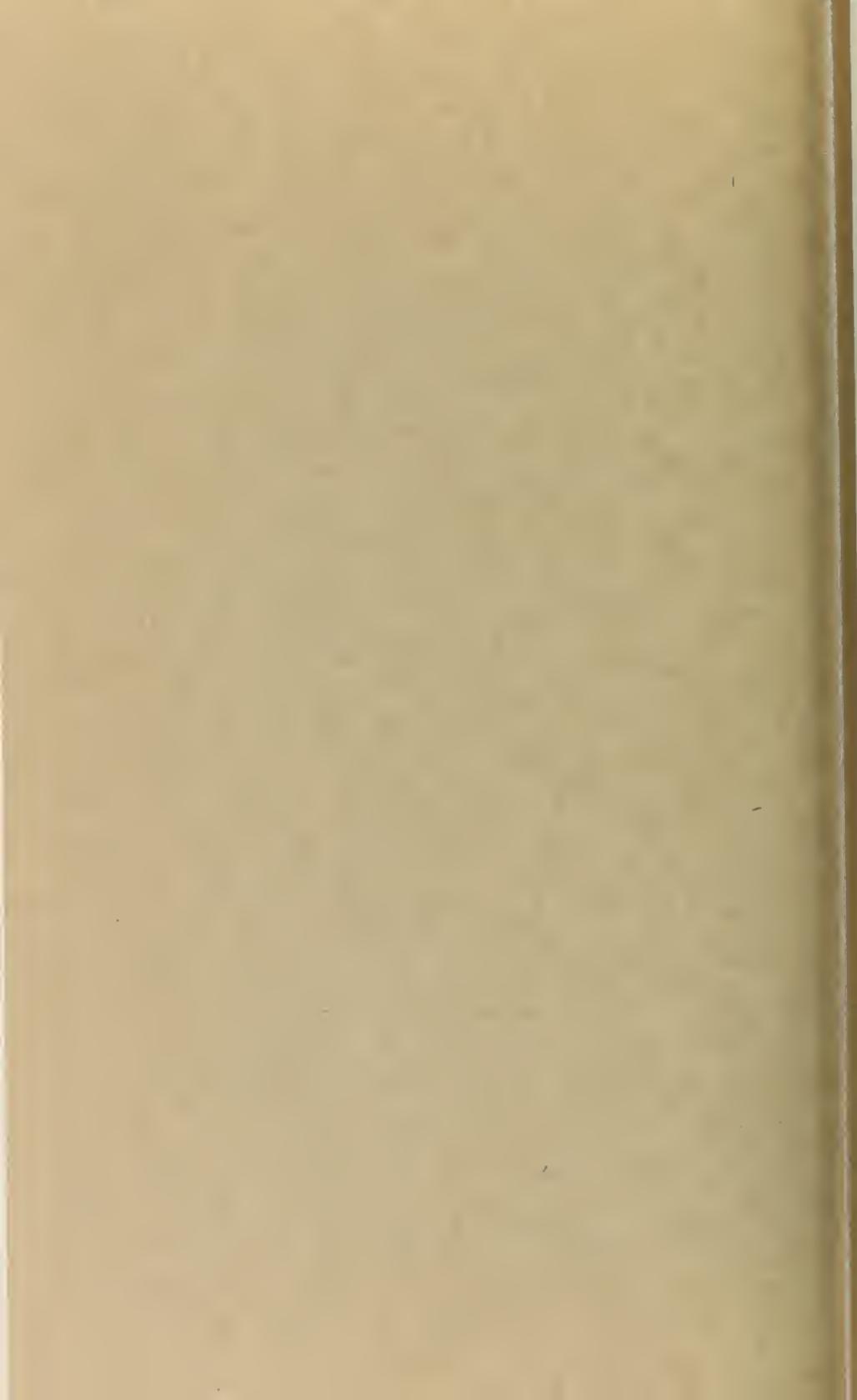
(Seal)

Attest:

/s/ M. C. Mulligan,  
Secretary.







## APPENDIX B.

### SECTIONS OF THE CIVIL AERONAUTICS ACT.

401(d)(2) In the case of an application for a certificate to engage in temporary air transportation, the Authority may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder.

\* \* \* \* \*

401(e)(1) If any applicant who makes application for a certificate within one hundred and twenty days after the date of enactment of this Act shall show that, from May 14, 1938, until the effective date of this section, it, or its predecessor in interest, was an air carrier, continuously operating as such (except as to interruptions of service over which the applicant or its predecessor in interest had no control), the Authority, upon proof of such fact only, shall, unless the service rendered by such applicant for such period was inadequate and inefficient, issue a certificate or certificates, authorizing such applicant to engage in air transportation (A) with respect to all classes of traffic for which authorization is sought, except mail, between the terminal and intermediate points between which it, or its predecessor, so continuously operated between May 18, 1938, and the effective

date of this section, and (B) with respect to mail and all other classes of traffic for which authorization is sought, between the terminal and intermediate points between which the applicant or its predecessor was authorized by the Postmaster General prior to the effective date of this section, to engage in the transportation of mail: *Provided*, That no applicant holding an air-mail contract shall receive a certificate authorizing it to serve any point not named in such contract as awarded to it and not served by it prior to April 1, 1938, if any other air carrier competitively serving the same point under authority of a contract as awarded to such air carrier shall prove that it is adversely affected thereby, and if the Authority shall also find that transportation by the applicant to and from such point is not required by the public convenience and necessity.